SUPREME COURT, U.S.
FILED

(1) 02 993 DEC 23 2002

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

JAMES HARVEY BROWN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

PETITION FOR WRIT OF CERTIORARI

Of Counsel:

MARK A. MILLER
BAKER BOTTS L.L.P.
1299 Pennsylvania Avenue, NW
Washington, DC 20004-2400
(202) 639-7714

CAMILLE F. GRAVEL
711 Washington Street
P.O. Box 1792
Alexandria, LA 71309-1792
(318) 487-4501

WILLIAM H. JEFFRESS, JR.,
Counsel of Record
BAKER BOTTS L.L.P.
1299 Pennsylvania Avenue, NW
Washington, DC 20004-2400
(202) 639-7751

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

149pp

QUESTIONS PRESENTED

1. Whether the command of Rule 16(a)(1)(A), Federal Rules of Criminal Procedure (as amended in 1991) to disclose "any written record" of a defendant's oral statement to a government agent requires disclosure of the agent's contemporaneous notes of such a statement.

2. Whether a defendant who is forbidden by the trial judge from establishing at trial that false oral statements he is charged with making to an FBI agent appear nowhere in the agent's contemporaneous notes of the interview is denied his right under the Confrontation Clause of the Sixth Amendment.

3. Whether the Sixth Amendment permits empanelment of a jury of persons whose identities and places of employment are kept secret from the defendant, in a case not presenting any threat to the safety or security of jurors.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT	4
REASONS FOR GRANTING THE WRIT	10
A. Whether A Defendant Is Entitled To Disclosure of An Agent's Contemporaneous Notes of His Oral Statement Under Fed. R. Crim. P. 16(a)(1)(A) Is An Important And Frequently Occurring Issue On Which Federal Courts Have Disagreed	11
B. Whether the Confrontation Clause Permits A Defendant To Be Barred From Questioning the Sole Witness Against Him About the Witness's Contemporaneous Record of the Alleged Offense Is An Issue On Which Certiorari Should Be Granted	14
C. Whether or When An Anonymous Jury Satisfies the Sixth Amendment Is An Important Issue That Should Be Decided By This Court	17
CONCLUSION	20
APPENDICES	
Order of the Court of Appeals for the Fifth Circuit Denying Petition for Rehearing and Rehearing En Banc, dated September 23, 2002	1a

TABLE OF CONTENTS—Continued

Page

Decision of the Court of Appeals for the Fifth Circuit dated August 23, 2002 ..... 3a

Decision of the United States District Court for the Middle District of Louisiana regarding post-trial motions, dated January 26, 2001 ..... 40a

Order of the United States District Court for the Middle District of Louisiana denying defendant's request for agent's handwritten notes, dated September 22, 2000 ..... 102a

Order of the United States District Court for the Middle District of Louisiana granting government's motion for anonymous jury, dated August 10, 2000 ..... 104a

Ruling of the United States District Court for the Middle District of Louisiana denying defendant's request for agent's handwritten notes, dated March 23, 2000 ..... 110a

Excerpts from trial transcript 114a

TABLE OF AUTHORITIES

FEDERAL CASES	Page
Davis v. *Alaska*, 415 U.S. 308 (1974)	15
Delaware v. *Van Arsdall*, 475 U.S. 673 (1986)	15, 17
Oses v. *Massachusetts*, 775 F. Supp. 443 (D. Mass. 1991), *cert. denied*, 506 U.S. 954 (1992)	19
Salinas v. *United States*, 522 U.S. 52 (1997)	14
United States v. *Barnes*, 604 F.2d 121 (2d Cir. 1979), *cert. denied*, 446 U.S. 907 (1980)	18
United States v. *Bowman*, 302 F.3d 1228 (11th Cir., 2002)	17
United States v. *Branch*, 91 F.3d 699 (5th Cir. 1996), *rev'd on other grounds sub nom. Castillo* v. *United States*, 530 U.S. 120 (2000)	19
United States v. *Carneglia*, 2002 WL 31097569 (2d Cir. Sept 19, 2002)	17
United States v. *Carucci*, 183 F.R.D. 614 (S.D.N.Y. 1999)	13
United States v. *Coe*, 220 F.3d 573 (7th Cir. 2000)	9, 12
United States v. *Edwards*, 303 F.3d 606 (5th Cir. 2002)	18
United States v. *Gonzales*, 520 U.S. 1 (1997)	14
United States v. *Gonzalez*, 1998 U.S. Dist. LEXIS 3838 (N.D.N.Y Mar. 24, 1998)	13
United States v. *Griggs*, 111 F. Supp. 2d 551 (M.D. Pa. 2000)	13
United States v. *Krout*, 66 F.3d 1420 (5th Cir. 1995), *cert. denied*, 516 U.S. 1136 (1996)	9, 18
United States v. *Mango*, 1997 U.S. Dist. LEXIS 6145 (N.D.N.Y. May 1, 1997)	13
United States v. *Mansoori*, 304 F.3d 635 (7th Cir. 2002)	17

TABLE OF AUTHORITIES—Continued

	Page
United States v. *Mebust*, 857 F. Supp. 609 (N.D. Ill. 1994)	13
United States v. *Molina-Guevara*, 96 F.3d 698 (3d Cir. 1996)	12
United States v. *Muhammad*, 120 F.3d 688 (7th Cir. 1997)	9, 12
United States v. *Sanchez*, 74 F.3d 562 (5th Cir. 1996)	19
United States v. *Service Deli Inc.*, 151 F.3d 938 (9th Cir. 1998)	13
United States v. *Stock*, 948 F.2d 1299 (D.C. Cir. 1991)	16
United States v. *Walker*, 922 F. Supp. 732 (N.D.N.Y. 1996)	13
United States v. *Wright*, 2001 WL 523394 (D. Kan. April 26, 2001)	13

RULES AND STATUTES

Fed. R. Crim. P. 16(a)(1)(A)	*passim*
Fed. R. Crim. P. 16(a)(1)(C)	5
S.Ct. Rule 10(c)	17
18 U.S.C. § 1001	5, 10
28 U.S.C. § 1254(1)	2

IN THE

Supreme Court of the United States

No. ___

JAMES HARVEY BROWN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner James H. Brown respectfully requests that this Court issue a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals (App. 3a-39a) is reported at 303 F.3d 582 (5th Cir. 2002). Two orders of the district court denying petitioner's request for disclosure of the agent's contemporaneous notes (App. 102a-103a, and 110a-111a) are unreported. The district court's opinion granting the government's request to empanel an anonymous jury (App. 104a-109a) is unreported. The trial court's opinion denying petitioner's motion for a new trial (App. 40a-101a) is unreported.

JURISDICTION

The court of appeals entered its judgment August 23, 2002. Timely petitions for rehearing and rehearing en banc were denied on September 23, 2002. (App. 1a.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Rule 16(a)(1)(A), Federal Rules of Criminal Procedure, provides in relevant part as follows:

> Rule 16. Discovery and Inspection
>
> (a) Governmental Disclosure of Evidence.
>
> (1) Information Subject to Disclosure.
>
> (A) Statement of Defendant. Upon request of a defendant the government must disclose to the defendant and make available for inspection, copying, or photographing: any relevant written or recorded statements made by the defendant, or copies thereof, within the possession, custody, or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government; that portion of any written record containing the substance of any relevant oral statement made by the defendant whether before or after arrest in response to interrogation by any person then known to the defendant to be a government agent; and recorded testimony of the defendant before a grand jury which relates to the offense charged. The government must also disclose to the defendant the substance of any other relevant oral statement made by the defendant whether before or after arrest in response to interrogation by any person then

> known by the defendant to be a government agent if the government intends to use that statement at trial. * * *

Rule 16(a)(1)(A), prior to its amendment in 1991, provided in relevant part as follows:

> Rule 16. Discovery and Inspection
>
> (a) Disclosure of Evidence by the Government.
>
> (1) Information Subject to Disclosure.
>
> (A) Statement of Defendant. Upon request of a defendant the government shall permit the defendant to inspect and copy or photograph: any relevant written or recorded statements made by the defendant, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government; the substance of any oral statement which the government intends to offer in evidence at the trial made by the defendant whether before or after arrest in response to interrogation by any person then known to the defendant to be a government agent; and recorded testimony of the defendant before a grand jury which relates to the offense charged. * * *

The Sixth Amendment to the United States Constitution provides as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the

witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT

Petitioner served as Louisiana's elected Insurance Commissioner from 1991 until his conviction in this case in October 2000. In the fall of 1996, the government installed wiretaps on the telephone of former Governor Edwin Edwards and a bug in his law office. In the course of that surveillance the FBI recorded numerous conversations between Edwards and others, including petitioner Brown, concerning attempts to resolve a controversy between Edwards' client David Disiere on the one hand and the Louisiana "insurance duty judge," A. Foster Sanders, and his appointees on the other. The controversy was the subject of a settlement involving payment of $2.5 million by Disiere to the court-appointed Receiver of Cascade Insurance Company in December 1996.

In 1999, the government brought an indictment containing numerous counts charging, in essence, that the Cascade settlement was "fixed" and was a "sham." There was no evidence that petitioner or any other public official solicited or received payment of any kind. The government's central theory was that Edwards offered Judge Sanders assistance in resolving a criminal investigation on an unrelated matter, in exchange for Sanders' assistance in resolving the Disiere matter, and that petitioner and attorney Ron Weems assisted him in doing so. The wiretap tapes and testimony, however, failed to establish the charges and the jury acquitted the petitioner, Edwards and Weems on all counts charging misconduct relating to the Cascade matter.[1]

---

[1] Edwin Edwards was convicted in a separate case involving riverboat gaming licenses, which is related to this one only by the fact that the evidence arose in part from the same wiretaps. A codefendant in that case

In May of 1997, before disclosure of the wiretap, FBI agent Harry Burton interviewed petitioner regarding the Cascade settlement. The interview was not recorded and not under oath. Most of Burton's questions concerned what he already knew from the undisclosed wiretap tapes—including what Brown had discussed with whom, when and where. Burton took 11 pages of detailed notes during the 45-minute interview. Three days later he prepared a typewritten Form 302 memorandum purporting to summarize the interview. That 302 formed the basis of 13 false statement charges against the petitioner under 18 U.S.C. § 1001. Petitioner was found guilty on seven counts by the jury. The district court granted a judgment of acquittal notwithstanding the verdict on two of those counts. Petitioner was sentenced to imprisonment for six months, a fine of $50,000.00 and two years' probation.

Petitioner's defense at trial was that Agent Burton manufactured the false statement charges by "twist[ing] and misrepresent[ing] practically everything Jim Brown said in that interview." Tr. 477. To support that defense, petitioner sought disclosure of Burton's contemporaneous notes under Fed. R. Crim. P. 16(a)(1)(A), 16(a)(1)(C), the Jencks Act, and the *Brady* doctrine. Although the government produced to codefendant Weems the contemporaneous notes of Burton's interview of Weems, it consistently refused to disclose the notes of Brown's interview.[1] The district court denied

---

was Cecil Brown, who is not related to petitioner Jim Brown. The convictions of Edwards and Cecil Brown were affirmed by the Fifth Circuit in an opinion rendered the same day as the decision in the present case, and petitioner understands that petitions for certiorari by Edwards and Cecil Brown have been or will be filed. Apart from the fact that anonymous juries were empaneled in both cases, the issues presented by petitioner here are entirely unrelated to those asserted by Edwin Edwards and Cecil Brown in the riverboat gaming case.

petitioner's requests to compel disclosure that were made pretrial, during trial, and after trial. (App. 102a, 111a).[2]

Agent Burton was the sole witness called by the prosecution regarding the interview, and (to rebut Brown's argument that the interview was not tape-recorded) he claimed on direct examination that he had "recorded the interview" by taking contemporaneous notes.[3] Despite that testimony, the district court denied a renewed request for the notes made by petitioner during Burton's cross-examination. Petitioner then requested the court to advise the jury that Mr. Brown did not have the notes.[4] However, in doing so, the court without warning told the jury that it had determined the 302 was "accurate based on the handwritten notes." (App. 118a.) A motion for mistrial based on this instruction was denied, and when asked to give a corrective instruction, the court told the jury only that its determination was "irrelevant" because it was the jury's province to determine credibility of the witness. (App. 122a.)

The trial judge nevertheless sustained an objection to any and all questions by petitioner asking Agent Burton whether his contemporaneous notes reflected statements recited in the 302 and charged in the indictment. For example, Agent Burton testified that, as recited in his 302 and alleged in the indictment, Brown falsely told him he had not discussed "what it would take to settle the Cascade matter" with Edwin

---

[2] The notes were disclosed to the defense by order of the Fifth Circuit, and are in the record on appeal.

[3] "Q. You already went over the method of how you record the interview normally, and that's with notes, correct? A. Yes, sir." (Tr. 1543.)

[4] Such an instruction was felt necessary by Brown because of Burton's testimony that he had recorded the interview by taking notes, and to avoid any adverse inference by the jury from the fact that the notes were not used in cross-examination by Brown. (Weems, by contrast, did use the notes of his interview extensively in his cross-examination of Burton and was acquitted on the false statement charge against him.)

Edwards. That statement does *not* appear in Burton's contemporaneous notes, but the jury never learned that. When petitioner sought to question Burton on the subject, the objection and ruling were as follows:

> Q. Do your notes that you actually wrote down when you were in that interview say that Jim Brown said that he didn't discuss with Edwin Edwards what it would take—
>
> Mr. James Mann: I object. We talked about the notes earlier, Your Honor, that that has already been previously determined, and I think that that is going to be misleading to the jury to put those at issue here. That's exactly what Mr. Jeffress is trying to do by putting those notes at issue.
>
> The Court: I think that's correct. Stick to the 302. (App. 123a.)

All counts upon which the petitioner was ultimately convicted involved alleged denials by him of having discussed "settlement issues" or "what it would take to settle the matter" with Edwards, Weems, or anyone else, or (in Count 55) a denial of discussing "specifics of a settlement" with Judge Sanders. Petitioner's defense on these counts was that he did not make the statements alleged; rather, Burton asked and petitioner answered only about the actual settlement of the lawsuit, in which petitioner played no role and did not discuss with Edwards, Weems or Sanders. The contemporaneous notes demonstrably assist this defense. If petitioner had been able to confront Burton with his contemporaneous notes, he would have established at least the following:

- The statement alleged in Count 44 and contained in Burton's 302—that Brown was only "vaguely aware" of Cascade Insurance Company—is not contained in Burton's notes.

- The statement alleged in Count 46 and contained in the 302 is contradicted by Burton's notes, which state—exactly as petitioner testified at trial—that petitioner denied having *seen* a draft RICO suit, not having been aware of it.
- The statements alleged in Count 50 and contained in the 302—that Brown denied discussing with Edwards "settlement issues" or "what it would take to settle the case"—are not contained in Burton's notes.
- The key statements contained in the 302 regarding Count 51—that a conversation in Edwards' office "related to political matters" and "had nothing to do with Cascade Insurance Company or David Disiere"—are not contained in the notes.
- The key phrase "settlement issues," contained four times in the 302 and six times in the indictment (Counts 47, 48 and 50), appears nowhere in Burton's contemporaneous notes of the interview.

Notwithstanding the foregoing and other discrepancies between the notes and the 302, the court below concluded that "with the possible exception of Count 50," the notes "are substantially identical to the 302 report that was disclosed to Brown with respect to all counts of which Brown was convicted" (App. 9a, *infra*), and that with respect to Count 50, any error in nondisclosure of the notes was harmless in light of Brown's testimony regarding that count. App. 24a, *infra*. In reaching this conclusion, the court applied the Fed. R. Crim. P. 52(a) standard, rather than the standard of harmless error for errors abridging constitutional rights.

The court of appeals concluded that Rule 16(a)(1)(A) "does not grant a criminal defendant a right to preparatory interview notes where the content of those notes have been accurately captured in a typewritten report, such as a 302, that has been disclosed to the defendant." App. 8a-9a, *infra*. It relied on decisions by the Seventh Circuit in two cases which did not

discuss the language of the rule as amended in 1991.[5] With respect to the amended rule, the court in a footnote held that the amendment merely gave the defendant the right to disclosure of oral statements whether or not the government intended to use them at trial, and did not change "the *types* of records that must be disclosed. . . ." App. 9a n.18, *infra* (emphasis in original).

With respect to the Confrontation Clause, the court of appeals applied an abuse of discretion standard. Although the issue was whether petitioner was entitled to confront Agent Burton with the *content* of his notes, the court of appeals found the Confrontation Clause was not violated because petitioner was allowed "substantial leeway in questioning Burton on his note-taking procedures and report preparation." App. 27a, *infra*. With regard to the trial court's instruction to the jury that it had determined the 302 was "accurate based on the handwritten notes," the court of appeals found this instruction "did not improperly vouch for the accuracy of the 302." App. 27a, *infra*.[6]

With respect to the propriety of an anonymous jury, the court of appeals applied the five factors identified in *United States* v. *Krout*, 66 F.3d 1420, 1426-28 (5th Cir. 1995), *cert. denied*, 516 U.S. 1136 (1996), as justifying the use of such a measure. It found three of those factors applicable: (1) that there had been past attempts by the defendants to interfere

---

[5] *United States* v. *Muhammad*, 120 F.3d 688, 699 (7th Cir. 1997); *United States* v. *Coe*, 220 F.3d 573, 583 (7th Cir. 2000).

[6] The court of appeals also stated that the instruction "accurately described the disclosure process, as Brown requested." App. 27a, *infra*. In fact, there was no such request. Following the trial court's ruling that counsel could not see Burton's notes, counsel—in an effort to explain to the jury why the content of those notes was not being addressed in cross-examination—asked the court simply to instruct that "Mr. Jeffress does not have the notes. I have ruled he is not entitled to the notes." App. 116a, *infra*.

with the judicial process or witnesses, because two co-conspirators had pleaded guilty to witness tampering;[7] that the defendants faced lengthy sentences if convicted; and that the extensive publicity of the trial could expose the jurors to intimidation and harassment. App. 32a-33a, *infra*. Because of these factors, the court of appeals held, the trial court did not "abuse its discretion in ordering an anonymous jury." *Id.* at 34a.

REASONS FOR GRANTING THE WRIT

The petitioner was accused under 18 U.S.C. § 1001 of making false oral statements to an FBI agent in an unsworn, unrecorded interview at which the agent, but not the petitioner, was aware of secret recordings of the petitioner's words at the meetings and conversations about which the agent was asking. At trial, petitioner contended that the agent's 302 memorandum of the interview, upon which the indictment was based, twisted and misrepresented the defendant's statements during the interview, in an effort to lay the basis for a false statements prosecution.

The agent's contemporaneous notes of the interview do not reflect at all certain of the statements contained in the 302 and in the indictment, and they differ with respect to virtually every statement charged in respects that are sometimes subtle but uniformly helpful to the defense. The jury, however, never learned that. The petitioner was convicted at a trial where he was not allowed to inspect the contemporaneous notes, where he was not allowed to question the agent about

---

[7]These alleged co-conspirators were Judge Sanders and the Receiver, Robert Bourgeois. The alleged witness tampering was changing the payment terms for the attorney prosecuting a civil RICO lawsuit against Cascade's former owner from an hourly rate to a contingency fee, in order to induce him to settle the threatened lawsuit.

the content of those notes, and where the trial court told the jury that the undisclosed notes supported the accuracy of the 302 on which the indictment was based.

In holding that the petitioner under these circumstances received a trial consistent with the requirements of the Constitution and the Federal Rules of Criminal Procedure, the court of appeals decided two important and recurring issues on which federal courts have disagreed. The court also decided an issue that is raised with increasing frequency in the lower federal courts, and which this Court has not decided: the circumstances under which, if at all, the Sixth Amendment permits empanelment of a jury in a criminal case where the identities, residence and place of employment of jurors is withheld from the defendant. These issues warrant review by this Court in this case.

A. Whether A Defendant Is Entitled To Disclosure of An Agent's Contemporaneous Notes of His Oral Statement Under Fed. R. Crim. P. 16(a)(1)(A) Is An Important And Frequently Occurring Issue On Which Federal Courts Have Disagreed

Before the amendment of Rule 16(a)(1)(A) in 1991, a defendant who had made unrecorded oral statements to a government agent was entitled to disclosure only of the "substance" of those statements, and then only if the government intended to use the statement at trial. (See *supra* p. 3.) The 1991 amendment for the first time gave the defendant the right not just to the "substance" of the statement, but to "any written record" of it. Where such a record exists, the defendant is entitled to disclosure whether or not the government intends to use the statement at trial. Where no such record exists, the defendant continues to be entitled to disclosure of the "substance" of the statement only when the government intends to use it at trial.

As amended, the rule makes no distinction among types of written records, and does not permit the record to be withheld based upon a judgment by the government or by the court that it would not be helpful to the defense. The language of the rule is plain, and it is mandatory: the government "must disclose to the defendant...that portion of any written record containing the substance of any relevant oral statement made by the defendant" to a government agent. There is no question that contemporaneous notes qualify as a "written record." As stated in the Advisory Committee Note to the 1991 amendment, "[t]he written record need not be a transcription or summary of the defendant's statement but must only be some written reference which would provide some means for the prosecution and defense to identify the statement."

Before 1991, courts generally ruled that a defendant was not entitled to disclosure of an agent's notes unless disclosure was required by the Jencks Act or the *Brady* doctrine. The Seventh Circuit in *United States* v. *Muhammad*, 120 F.3d 688, 699 (7th Cir. 1997), applied this principle in a case arising after the 1991 amendment, but did not cite Rule 16(a)(1)(A), much less consider the 1991 amendment of that rule; it relied entirely on cases deciding issues under the Jencks Act and the Confrontation Clause. The same court again stated the principle in *United States* v. *Coe*, 220 F.3d 573, 583 (7th Cir. 2000), but merely cited *Muhammad* and again did not discuss the amended rule.

By contrast, other federal courts have applied Rule 16(a)(1)(A)'s plain language to require disclosure of an agent's contemporaneous notes, without regard to whether a memorandum of the statement has been produced. In *United States* v. *Molina-Guevara*, 96 F.3d 698, 705 (3d Cir. 1996), the court of appeals considered whether the district court erred in refusing to order production of an agent's handwritten notes of her interview of the defendant "from which

the agent's final report was prepared." Although the final report *had* been disclosed, the court found: "as the government conceded before us, production of these notes was required by Federal Rule of Criminal Procedure 16," and directed the notes to be produced at retrial. Federal district judges have frequently reached the same conclusion. *E.g.*, *United States* v. *Carucci*, 183 F.R.D. 614, 615 (S.D.N.Y. 1999) (citing the "unambiguous and unequivocal language of Rule 16(a)(1)(A)"); *United States* v. *Wright*, 2001 WL 523394 (D. Kan. Apr. 26, 2001) (ordering production of agent's field notes); *United States* v. *Griggs*, 111 F. Supp. 2d 551, 555 (M.D. Pa. 2000) (ordering disclosure of rough notes taken by police officer during post-arrest interview of defendant); *United States* v. *Gonzalez*, 1998 U.S. Dist. LEXIS 3838 (N.D.N.Y Mar. 24, 1998). Other district courts, however, have refused disclosure. *See, e.g., United States* v. *Mango*, 1997 U.S. Dist. LEXIS 6145, *66-67 (N.D.N.Y. May 1, 1997), *rev'd in part on other grounds*, 199 F.3d 85 (2d Cir. 1999); *United States* v. *Walker*, 922 F. Supp. 732, 744 (N.D.N.Y. 1996); *United States* v. *Mebust*, 857 F. Supp. 609, 615 (N.D. Ill. 1994).

The amended language of Rule 16(a)(1)(A) was also considered by the First Circuit in *United States* v. *Service Deli Inc.*, 151 F.3d 938 (9th Cir. 1998), reversing a conviction because the government, even though it produced a typewritten memorandum of a witness interview, did not produce the contemporaneous notes on which it was based. Although the court based its ruling on *Brady*, it made clear in a footnote that, if the interview had been of the defendant himself rather than a former officer of the corporate defendant, Rule 16(a)(1)(A) would have required disclosure. *See* 151 F.3d at 943 n.4.

In the present case, the court of appeals followed *Muhammad* and *Coe*, and dealt with the language of the amended rule in a footnote. The court opined that the "pur-

pose" of the 1991 amendment was "merely to require full disclosure of *every* statement of the defendant, regardless of whether the government intended to use the statement at trial." App. 9a n.18, *infra* (emphasis in original). The court obviously overlooked the fact that where no "written record" exists, the amended rule *continues* to predicate disclosure of the substance of a relevant statement on an intent by the government to use the statement at trial. Further, in its effort to divine the "purpose" of the amendment, the court overlooked its plain language. As this Court has observed, without qualifying language the statutory term "any" is virtually unlimited in scope. *United States* v. *Gonzales*, 520 U.S. 1, 5 (1997); *Salinas* v. *United States*, 522 U.S. 52, 57 (1997). The court of appeals' reading of "any written record" to mean "a" or "some" written record violates the principle that statutes and rules are to be applied according to their plain language.

The issue presented by this case is demonstrably one that frequently occurs and on which lower courts have disagreed. Whether the rule commands disclosure of contemporaneous notes, or only of an agent's subsequent typewritten and "polished" account of a witness's statement, is one likely to trouble lower courts in criminal cases until it is settled by this Court. The present case squarely presents the issue in its most important application: one where the notes were not simply an account of the defendant's words *concerning* the offense, but were an account of *the offense itself*.

B. Whether the Confrontation Clause Permits A Defendant To Be Barred From Questioning the Sole Witness Against Him About the Witness's Contemporaneous Record of the Alleged Offense Is An Issue On Which Certiorari Should Be Granted

The "main and essential purpose" of the Sixth Amendment's Confrontation Clause is to secure for the defendant the opportunity for cross-examination of the witnesses against

him. *Davis* v. *Alaska*, 415 U.S. 308, 315-16 (1974). While courts necessarily have discretion to impose reasonable limits on cross-examination based on concerns such as harassment, confusion of the issues, repetition or relevance, a court may not, consistent with the Confrontation Clause, cut off *all* questioning on a matter relevant to the credibility of the witness. *Delaware* v. *Van Arsdall*, 475 U.S. 673, 679 (1986).

That, of course, is precisely what occurred in this case. The trial judge precluded the defense from asking the sole witness against him on these charges—FBI Agent Burton—*any* questions about the content of his notes. Indeed, the district judge sustained objection to a question that dramatically demonstrates the power such a cross-examination could have had. After Burton testified that, as reflected in his 302 and as alleged in the indictment, Mr. Brown stated during the interview that he had not discussed with Edwin Edwards what it would take to settle the Cascade case, defense counsel asked him whether the notes he took at the time of the interview reflected such a statement. (See *supra*, pp. 6-7.) A true answer, as we now know, would have been "No. They do not show that." But the jury never heard the answer, or saw the notes. Nor did it hear any other evidence of what the notes contained, other than a statement by the trial judge that she had reviewed the notes and found they supported the accuracy of the 302. The court's actions denied petitioner his right under the Confrontation Clause more seriously than the limitations on cross-examination as to one source of possible bias found to have been constitutional violations in *Davis* v. *Alaska* and *Delaware* v. *Van Arsdall*, *supra*.

The opinion of the court of appeals in this case found no violation of the Sixth Amendment because, it said, petitioner was able to and did question Agent Burton about his "note-taking procedures and report preparation." App. 27a, *infra*. It is unclear why the court of appeals felt such cross-examination, which was undertaken without benefit of the

notes themselves or any ability to compare them to the 302, was a substitute for cross-examination about the *content* of the notes. It is as if, in *Delaware* v. *Van Arsdall*, the judge had allowed the defendant to question the witness about police procedures for dismissing public drunkenness charges, but precluded questioning as to whether such a charge had been dismissed as to the defendant.

The D.C. Circuit decision in *United States* v. *Stock*, 948 F.2d 1299, 1301-02 (D.C. Cir. 1991), squarely conflicts with the decision in this case. There, the police officer testified at trial that the defendant stated "I don't have anything" at the time of arrest. The defendant sought to bring out that the police report contained no such statement, but the trial court sustained an objection to this line of questioning. The court of appeals found a violation of the Confrontation Clause and reversed, without stopping to consider whether the defendant had an opportunity to question the police officer about his procedures for preparing reports. In the present case, the constitutional violation is similar to, but even more clear than the violation in *Stock*: the petitioner was wholly precluded from asking Agent Burton whether a statement he testified the defendant made was contained in his notes.

The court of appeals also found, elsewhere in its opinion (App. 24a, *infra*), that forbidding petitioner from questioning Agent Burton about the content of his notes was "harmless." That finding—which was addressed specifically to a particular count—was contrary to the record,[8] but that is not its

---

[8] The court stated that according to his testimony, Brown's defense on Count 50 was not that he never made the charged statement to Burton, but that the statement was true. But Brown was not asked—either by the defense or the prosecution—whether he made the statement attributed to him by Burton. He was asked, on direct examination, whether he had discussed the "settlement issues" with Edwin Edwards, and testified he had not. (Tr. 2550.) He was then asked about the allegation that he had denied—as Burton claimed—discussing with Edwards "what it would

only fault. When a violation of the Confrontation Clause is found, it may be deemed harmless only where "assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt." *Delaware* v. *Van Arsdall*, 475 U.S. 673 (1986). The panel did not apply the standard of constitutional harmless error, nor may harmlessness fairly be found in this case.

C. Whether or When An Anonymous Jury Satisfies the Sixth Amendment Is An Important Issue That Should Be Decided By This Court

This Court has several times denied petitions for certiorari challenging the use of anonymous juries. But it has never ruled on the issue, and the increasing frequency with which anonymous juries are being used in district courts makes plain that it is "an important question of federal law that has not been, but should be, settled by [the Supreme] Court." S.Ct. Rule 10(c).

During a recent six-week period, four Circuits (including the Fifth) have addressed anonymous juries. In *United States* v. *Mansoori*, 304 F.3d 635 (7th Cir. 2002), the court found the empaneling of an anonymous jury was an abuse of discretion, even though the case involved organized crime. In *United States* v. *Carneglia*, 2002 WL 31097569 (2d Cir. Sept. 19, 2002), and *United States* v. *Bowman*, 302 F.3d 1228 (11th Cir. 2002), the courts found no abuse of discretion, but each case involved violent criminal organizations that had engaged in murders, kidnapping and (in *Carneglia*) jury tampering.

---

take to settle the matter," and his answer *directly contradicted Burton's testimony*: "Mr. Burton's focus was the settlement, the final settlement. That's how I always understood Mr. Burton's questions to be directed to me for, the final settlement." (*Id.*)

The cases in which other Circuits have upheld anonymous juries all have had an element of concrete threats to juror safety that were not present in petitioner's case.

The decision of the court of appeals in this case is thus in conflict with the decisions of those other Circuits. Indeed, until the Fifth Circuit's decisions the same day in this case and in *United States* v. *Edwards*, 303 F.3d 606 (5th Cir. 2002), an anonymous jury had never been upheld in a case where the showing of a defendant's threat to the integrity of the judicial process was so unconvincing that defendants were freed on personal recognizance during the proceedings.

The district court's decision to empanel an anonymous jury in this case demonstrates how quickly the lower courts now impose what was once considered a "drastic measure" and "device of last resort." *Krout*, 66 F.3d at 1427. In doing so, those courts have strayed from the original purpose of the anonymous jury: protecting jurors from serious threats of harm by violent criminal defendants. *See, e.g., United States* v. *Barnes*, 604 F.2d 121, 141 (2d Cir. 1979), *cert. denied*, 446 U.S. 907 (1980). The Fifth Circuit's ruling in this case means that the use of anonymous juries threatens to become no longer "drastic" but routine. That is demonstrated by the factors found by the court below to support the empaneling of an anonymous jury. The first factor cited by the court—that the defendants posed a threat to the integrity of the judicial system—finds no support in the record. The court of appeals relied on the fact that two alleged co-conspirators pleaded guilty to witness tampering, but that charge consisted merely of a theory that the defendants induced a contingency fee lawyer to settle a case rather than file it. There was no evidence of actual witness tampering, much less any threat to the safety of a witness.

The second factor was the possibility of a lengthy prison sentence, but that factor carries no weight in a case such as

this one, in which the defendants posed no threat of violence and were, in fact, released on personal recognizance throughout the proceedings in the district court.

The third factor was the presence of intense media interest, and consequent threat to the privacy interests of jurors. Again, this was not truly at issue. In opposing an anonymous jury, the defendants specifically suggested an order allowing the *defendants* to know the identity of prospective jurors, but to order those identities not be disclosed to the press or public. Such a solution would have fully protected juror privacy without impairing the defendants' rights to a fair trial. The Sixth Amendment presumes that a defendant is entitled to a trial by "known individuals" and a verdict that is "both personalized and personified." *United States* v. *Sanchez*, 74 F.3d 562, 565 (5th Cir. 1996). Before that constitutional right is limited, the court has an obligation to explore less restrictive means. *See Oses* v. *Massachusetts*, 775 F. Supp. 443, 460 (D. Mass. 1991), *aff'd*, 961 F.2d 985 (1st Cir.), *cert. denied*, 506 U.S. 954 (1992) (order placing defendant in gag and shackles denied him Sixth Amendment right to fair trial; trial court erred in failing to consider less-restrictive means of controlling defendant in courtroom). Limiting disclosure of juror identities to the parties and counsel was a readily available means that would not have interfered with the defendants' Sixth Amendment right to a public trial.

In addition, as the Fifth Circuit itself has held, "[n]ot all celebrated trials merit an anonymous jury." *United States* v. *Branch*, 91 F.3d 699, 724 (5th Cir. 1996), *rev'd on other grounds sub nom. Castillo* v. *United States*, 530 U.S. 120 (2000). While it is true that a case that "arouse[s] deep passions" could have "potentially disruptive effects . . . on the trial in general and on the jurors in particular," *id.*, this case—charging that a potential civil lawsuit was settled for less than it was worth—does not come close to arousing such passions. Nor does it pose such a significant risk to jurors' privacy as to

warrant an intrusion on a criminal defendant's Sixth Amendment rights. The Fifth Circuit's approval of an anonymous jury in this case as a practical matter holds that anonymous juries may be used in any publicized cases. This Court should now decide that important question presented under the Sixth Amendment.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Of Counsel:

MARK A. MILLER
BAKER BOTTS L.L.P.
1299 Pennsylvania Avenue, NW
Washington, DC 20004-2400
(202) 639-7714

CAMILLE F. GRAVEL
711 Washington Street
P.O. Box 1792
Alexandria, LA 71309-1792
(318) 487-4501

WILLIAM H. JEFFRESS, JR.,
Counsel of Record
BAKER BOTTS L.L.P.
1299 Pennsylvania Avenue, NW
Washington, DC 20004-2400
(202) 639-7751

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Filed Sep. 23, 2002]

No. 01-30173

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JAMES HARVEY BROWN,
Defendant-Appellant.

Appeal from the United States District Court for the
Middle District of Louisiana, Baton Rouge

ON PETITION FOR REHEARING
AND REHEARING EN BANC

(Opinion 8/23/02, 5 Cir., _____, _____ F.3d _____)

Before DAVIS, EMILIO M. GARZA, and STEWART, *Circuit Judges*

PER CURIAM:

( ) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED. R. APP. P. AND 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor, (FED. R. APP. P and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ W. Eugene Davis
W. EUGENE DAVIS
United States Circuit Judge

Judge Edith B. Clement did not participate in the consideration of the rehearing en banc.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Filed Aug. 23, 2002]

No. 01-30173

UNITED STATES OF *AMERICA*,
Plaintiff-Appellee,

v.

JAMES HARVEY BROWN,
Defendant-Appellant.

Appeal from the United States District Court
For the Middle District of Louisiana

Before DAVIS, EMILIO M. GARZA, and STEWART, *Circuit Judges*. W. EUGENE DAVIS, *Circuit Judge*:

James Harvey Brown appeals his convictions for making false statements to the FBI in violation of 18 U.S.C. § 1001 on numerous grounds. Because we conclude that any error that the district court may have committed was harmless under' the circumstances, we affirm Brown's convictions.

I.

This appeal arises out of a federal prosecution of former Louisiana Governor Edwin Edwards, Louisiana Insurance Commissioner James Harvey "Jim" Brown ("Brown"), and attorney Ronald Weems for allegedly engaging in a scheme of public corruption. The government charged that the three defendants committed federal crimes in connection with a 'sham settlement' that derailed a $27 million lawsuit

threatened by the State of Louisiana against David Disiere, president of Cascade Insurance Company ("Cascade"), a failed automobile insurance carrier.[1] The indictment charged numerous counts of conspiracy, mail and wire fraud, insurance fraud, witness tampering, and making false statements.[2]

The FBI became aware of Brown's involvement in the Cascade matter from conversations recorded through electronic surveillance of Edwards' home and office. The FBI recorded various conversations between Brown and Edwards about Cascade and Disiere. As a result, in May 1997, FBI agents Harry Burton and David Lyons interviewed Brown to ascertain his knowledge of and involvement in the Cascade matter. Brown's attorney, Bradley Myers, was also present at the interview. The interview was not recorded, but Burton took notes by hand. Burton claims during the interview, Brown denied discussing the Cascade matter with Edwards and denied having knowledge of any "settlement issues" involving Cascade. The interview took place on a Friday. The following Monday, Burton, using his notes, prepared a 302 report, recording the substance of his interview with Brown. The parties agree that all FBI procedures were followed in preparing the report. Both Agents Burton and Lyons initialed the report, indicating their belief that the 302 was an accurate record of the interview.

---

[1] *See United States v. Brown*, 218 F.3d 415, 418 (5th Cir. 2000).

[2] The Cascade trial at issue in this appeal was the second of three federal prosecutions involving former Governor Edwards. In the first trial, Edwards and several other defendants were convicted of charges based on bribery to obtain a, riverboat gambling license. In the third trial, also involving bribery allegations, the jury convicted Cecil Brown on seven out of nine counts. Edwards was an unindicted co-conspirator in that case and testified as a witness for Brown. *See United States v. Brown*, 250 F.3d 907, 910 (5th Cir. 2001).

This case was originally assigned to Judge Polozola, District Judge for the Middle District of Louisiana. In March 2000, Judge Polozola issued an order *denying Brown's* discovery request for production of Agent Burton's hand-written notes of his interview of Brown. However, in July 2000, all the judges in the Middle District recused themselves, and the case was promptly assigned to Judge Clement, then a district judge for the Eastern District of Louisiana. Judge Clement issued several pre-trial orders in which: (1) agreeing with Judge Polozola, she denied production of Burton's notes; (2) she ordered an anonymous jury; and (3) she admitted evidence procured from electronic surveillance of Edwards' home and office. With .respect to Agent Burton's hand-written notes, Judge Clement reviewed the notes *in camera*, and determined that the 302 report already disclosed to the defense accurately reflected the information contained in the notes. Accordingly, the court denied the defense's request for production of the notes.

Trial began in September 2000. At trial, Burton testified about his interview of Brown during his investigation into the Cascade settlement. Burton used his 302 to refresh his memory, but the 302 was not admitted into evidence. The defense had access to the 302, but in accordance with the district court's pre-trial order, not Burton's hand-written notes.

Edwards and Weems were acquitted of all charges. Brown was acquitted on most counts, but was found guilty on seven counts off making false statements to Agent Burton in violation of 18 U.S.C. § 1001. In January 2001, the district court issued a 58-page ruling on Brown's pending post-trial motions, acquitting him of two of the false statement convictions but upholding the others, and again denying

Brown's request to compel production of Agent Burton's notes. Brown was sentenced to six months' imprisonment on each count to be served concurrently.[3]

Brown now appeals on several grounds: (1) that the district court erred in not compelling the production of Burton's hand-written notes; (2) that the district court abused its discretion in limiting cross-examination of Burton regarding the notes and in issuing an instruction concerning the absence of the rotes; (3) that the district court abused its discretion in excluding the testimony of C.J. Blache, a witness the defense hoped would call into question Burton's ability to produce accurate 302 reports; (4) that the evidence was insufficient to support the conviction on Count 51; (5) that the district court abused its discretion in ordering an anonymous jury; and finally (6) that the district court erred in admitting evidence procured from electronic surveillance of Edwards' home and office. We discuss each of Brown's arguments in turn below.

II.

Brown first argues that the district court erred in refusing to order the government to disclose Burton's handwritten interview notes. Brown contends that he was entitled to the notes as a matter of law under Federal Rules of Criminal Procedure 16 (a) (1) (A) and (a) (1) (C) and the Jencks Act, 18 U.S.C. § 3500. Brown also asserts that nondisclosure of the notes denied him the right to a fair trial in violation of *Brady v. Maryland*,[4] because alleged discrepancies between Burton's notes and the 302 were material to Brown's defense theory that Burton had manufactured the false statement

---

[3] Brown also was sentenced to two years of supervised release on each count to be served concurrently after imprisonment and fined $10,000 for each count, for a total fine of $50,000.

[4] 373 U.S. 83 (1963).

charges against Brown. For these reasons, Brown argues that he is entitled to a new trial. We address each of these issues below.

A.

Brown first contends that he was entitled to Agent Burton's interview notes as a matter of law under Federal Rule of Criminal Procedure 16(a) (1) (A) . We review the district court's interpretation of Rule 16(a) (1) *de nova*, but its decision to withhold the notes only for abuse of discretion.[5]

Rule 16(a) (1) (A) provides, in relevant part:

> Upon request of a defendant the government must disclose to the defendant and make available for inspection, copying, or photographing: any relevant written or recorded statements made by the defendant, or copies thereof, within the possession, custody, or control of the government, the existence which is known, or by the, exercise of due diligence may become known, to the attorney for the government; that portion of *any written record* containing the substance of any relevant oral statement made by the defendant whether before or after arrest in response to interrogation by any person then known to the defendant to be a government agent . . .[6]

The Seventh Circuit considered a case similar to the one at hand in *United States v. Muhammad*.[7] In that case, the defendant, Muhammad, was convicted of obstruction of justice and bribery.[8] Muhammad was *serving as a juror in an* unrelated case when he offered to sway fellow jurors to rule in favor of a party in the case in exchange for money.[9] In an

---

[5] *See United States v. Ross*, 511 F.2d 757, 762 (5th Cir. 1975).

[6] Fed. R. Crim. P. 16(a)(1)(A) (emphasis added).

[7] 120 F.3d 688, 699 (7th Cir. 1997).

[8] *Id.* at 692.

[9] *Id.* at 691-92.

interview with two FBI agents, Muhammad allegedly confessed that he committed the crime.[10] At trial, one of the agents testified that he witnessed Muhammad's confession during the interview, using the 302 report prepared by the other agent to refresh her recollection.[11] The government disclosed the 302, but not the handwritten interview notes used to prepare the 302. The defendant sought disclosure of the notes.[12] The district court reviewed the agent's notes, found that the 302 report was a faithful summary of the notes, and refused to order disclosure.[13]

The Seventh Circuit affirmed.[14] The court held that a criminal defendant "is not entitled to an agent's notes if the agent's report contains all that was in the original notes."[15] The court noted that the district court found no inconsistencies, between the 302 and the interview notes and that the defendant had access to the 302 for use in cross-examination.[16] The Seventh Circuit had since stressed that Rule 16Ia)(1)(A) does not require disclosure of an agent's rotes even where there are "minor discrepancies" between the notes and the disclosed 302.[17]

We agree. Rule 16(a) (1) (A) does not grant a criminal defendant a right to preparatory interview notes where the

---

[10] *Id.* at 692.

[11] *Id.* at 698.

[12] *Id.*

[13] *Id.* at 699.

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *United States v. Coe*, 220 F.3d 573, 583 (7th Cir. 2000) (holding that the district court did not abuse its discretion in refusing to order the disclosure of handwritten interview notes where the government had disclosed a type-written report that accurately summarized the notes).

content of those notes have been accurately captured in a typewritten report, such as a 302, that has been disclosed to the defendant. The government satisfies its obligation under the Rule when it discloses a 302 report that contains all of the information contained in the interview notes. We therefore reject Brown's contention that Rule 16(a) (1) (A) entitles a criminal defendant to preparatory interview notes in every case.[18]

Moreover, as we discuss in detail in Part III.D. of this opinion, in this case, Burton's notes are substantially identical to the 302 report that was disclosed to Brown with respect to all counts of which Brown was convicted, with the possible exception of Count 50.[19] For the reasons given in that section of the opinion, however, even assuming that the difference between the notes and the 302 with respect to Count 50 is significant, we conclude that any error that the district court may have committed in that regard was harmless in light of Brown's own trial testimony.[20]

---

[18] Brown also asserts that the 1991 amendment to Rule 16(a) (1) (A) bolsters his *position that* he is entitled to Burton's notes as a matter of law. We disagree. The 1991 Amendment to Rule 16(a) (1) (A) broadened the scope of the Rule by requiring disclosure to criminal defendants of statements "without regard to whether the prosecution intends to use the statement at trial." Fed. R. Crim. P. 16 advisory committee's note. In contrast, the pre-1991 Rule required disclosure of records only of those statements "which the government intendf[ed] to offer in evidence at the trial." Fed. R. Crim. P. 16(a) (1) (A) (1991) . The purpose of the 1991 amendment, therefore, was merely to require full disclosure of *every*, statement of the defendant, regardless of whether the government intended to use the statement at trial. It follows that Brown's assertion that the 1991 amendment significantly changed the *types*, of records that must be disclosed is incorrect.

[19] We engage in a detailed comparison of Agent Burton's notes and the 302 in Part II. D. of this opinion, in which we address Brown's claims under *Brady v. Maryland*, 373 U.S. 83 (1963).

[20] *See United States v. Kimbrough*, 69 F.3d 723, 731 (5th Cir. 1995) (holding that "any prejudice or technical violation of Rule 16 is

B.

Brown next argues that he was entitled to disclosure of the notes as a matter of law under Federal Rule of Criminal Procedure 16(a) (1) (C) . This court reviews a district court's order not to disclose material under Rule 16(a) (1) (C) for abuse of discretion.[21] Rule 16(a) (1) (C) requires production of documents that are "material to the preparation of the defense."[22]

We reject Brown's assertion that Rule 16(a) (1) (C) requires production of preparatory interview notes in every case. Preparatory notes are not always, a:' Brown argues, material to the defense. Rather, we hold that the government fulfills the requirements of Rule 16(a) (1) (C) when it discloses to the defendant a 302 report that accurately reflects the contents of the interviewer's rough notes. In such cases, the notes are not "material" to the defense. Therefore, Rule 16(a) (1) (C) does not, as Brown maintains, entitle him to production of the notes without regard to the accuracy of the 302 that the government disclosed to the defense.

As explained in Part II.D. of this opinion, Burton's notes are completely consistent with the 302 that was disclosed to Brown in all respects, except possibly Count 50. For the same reasons given in that section of the opinion, we hold that any error the district court may have committed in this respect was harmless.[23]

---

insufficient to comprise a deprivation of (the defendant's] constitutional rights" and therefore, upholding his conviction); *United States v. Manetta*, 551 F.2d 1352, 1356 (5th Cir. 1977) (holding that violation of Rule 16 in that case was not harmless error).

[21] *See United States v. Luffred*, 911 F.2d 1011, 1015 (5th Cir. 1990).

[22] *See id.* (holding that the district court did not abuse its discretion in refusing to order production of government files under Rule 16 (a) (1) (C)).

[23] *See Kimbrough*, 69 F.3d at 731.

C.

Brown also argues that he was entitled to disclosure of Burton's notes as a matter of law under the Jencks Act.[24] This court reviews the district court's determination that the notes do not constitute a "statement" requiring disclosure under the Jencks Act for clear error.[25]

The Jencks Act requires the government "to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified."[26] A "statement" includes "a written statement made by said witness and signed or otherwise adopted or approved by him."[27] The Act entitles a criminal defendant to "relevant and competent reports and statements in the possession of the Government touching the events and activities as to which a Government witness has testified at the trial."[28] Brown argues that the notes are a "statement" of Burton, a testifying witness, and therefore, he is entitled to them under the Jencks Act.

In *United States v. Martin*,[29] the defendant, Martin, was convicted of interstate transportation of a stolen motor vehicle. An FBI agent testified that Martin confessed during an interview that he knew the vehicle was stolen and made other incriminating statements.[30] The defendant, however, denied that he made any of these statements.[31] After the agent

---

[24] 18 U.S.C. § 3500 (2002).

[25] See *United States v. Martinet*, 87 F.3d 731, 734 (5th Cir. 1996).

[26] 18 U.S.C. § 3500(b).

[27] 18 U.S.C. § 3500(e) (1).

[28] *Goldberg v. United States*, 425 U.S. 94, 104 (1976) (quoting S. Rep. No. 981, 85th Cong. 3 (1957)) (internal quotation marks omitted).

[29] 565 F.2d 362, 363 (5th Cir. 1978).

[30] *Id.*

[31] *Id.*

testified, the government gave the defense copies of 302 reports that summarized the agent's description of the interview, but did not disclose the agent's rough interview notes because the agent had destroyed them according to then-accepted FBI procedures.[32] The defense argued that destruction of the agent's notes violated the Jencks Act and entitled him to a new trial.[33]

This court held that there was no Jencks Act violation.[34] We stated that "[n]othing in the Jencks Act requires that notes made in the course of an investigation be preserved after the notes have served their purpose of assisting in the preparation of interview reports."[35]

Although this reasoning likely extends the present case, we need not decide this issue because we conclude that even if the district court violated the Jencks Act in this case, such error was harmless.[36] As we discuss in detail in Part II.D. of this opinion, Burton's notes are identical to the 302 in all key respects, with the possible exception of Count 50. As explained in that section, however, any discrepancy between the notes and the 302 in that regard is completely irrelevant in light of Brown's trial testimony. Thus, we reject Brown's argument on this issue.

---

[32] *Id.*

[33] *Id.*

[34] *Id.* at 363-64.

[35] *Id.* (quoting *United States v. Pacheco*, 489 F.2d 554, 566 (5th Cir. 1974)) (internal quotation marks omitted); *See also, United States v. Ramirez*, 954 F.2d 1035, 1038-39 (5th Cir. 1992) (holding that agent's rough notes were not statements under the Jencks Act where notes were scattered and all the information contained in them was available to the defendant in other forms).

[36] *See United States v. Ramirez*, 174 F.3d 584 587 (5th Cir. 1999) ("Even when a violation (of the Jencks Act] is found, the failure to produce prior statements is subject to a harmless error analysis."); *United States v. Sink*, 586 F.2d 1041, 1050-51 (5th Cir. 1978).

D.

Finally, Brown argues that nondisclosure of the notes violated his due process rights under *Brady v. Maryland*.[37] Under *Brady*, the government's failure to disclose evidence to the defense violates the defendant's due process rights where the evidence is (1) favorable to the defense; and (2) material to guilt or punishment.[38] Materiality is present if the e is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.[39] A "reasonable probability" exists when suppression of the evidence "undermines confidence in the outcome of the trial."[40] "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence."[41]

Brown maintains that he did not receive a fair trial because production of Burton's notes was essential to his defense theory that Burton manufactured the false statement charges against him. Brown asserts that post-trial release of the notes reveals significant discrepancies between Burton's notes and the 302. Pointing out these discrepancies to the jury, he contends, would have greatly bolstered his defense.

After conducting *in camera*, review of Burton's notes, the district court compared the notes to the 302 in painstaking detail in its January 2001 order on Brown's post-trial motions.[42] The district court found that "the rough notes and

---

[37] 373 U.S. 83, 87 (1963).

[38] *Id.; see also, East v. Johnson*, 123 F.3d 235, 237 (5th Cir. 1997).

[39] *See United States v. Bagley*, 473 U.S. 667, 682 (1985).

[40] *Id.* at 678.

[41] *Kyles v. Whitley*, 514 U.S. 419, 434 (1994).

[42] R. at 2459-64.

the 302 contain no discrepancies that would have aided Mr. Brown's defense."[43] The court further found that the defense was able to attack successfully on cross-examination "Burton's ability to *write things down correctly*, in his notes or to *copy things correctly*, from his notes to his 302."[44]

After a complete review of the record, we agree. With the possible exception of Count 50, Burton's notes are nearly identical to the 302 *to which Brown* had access with respect to every one of Brown's false statement convictions. *We* set out in some detail below our reasons for the above conclusion by comparing Burton's notes to the 302 with respect to each of Brown's five false statement convictions, turning first to Counts 48, 51, 54, and 55, and reserving discussion of Count 50 for last.

COUNT 48:

- *The Indictment Charges:*

  BROWN falsely stated he had never had any specific discussions with RONALD R. WEEMS, an attorney for Disiere, concerning settlement issues associated with Cascade Insurance Company when in truth and in fact BROWN we that he had conversations with WEEMS concerning seta issues involving the Cascade Insurance Company.[45]

- *The 302 States:*

  To a direct question, BROWN indicated a knowledge that RON WEEMS was associated with the CASCADE INSURANCE *COMPANY* as its Attorney of Record. He advised, however, he never had any specific discussions with RON WEEMS concerning settlement issues associated with CASCADE.

---

[43] R. at 2459.

[44] R. at 2456 (emphasis in original).

[45] Ind. at 46.

WEEMS would come to the department on a number of occasions, usually to meet with KIP WALL, and on occasion would peek in and say hello to BROWN. BROWN however had no specific discussion with WEEMS concerning the efforts of CASCADE INSURANCE COMPANY to settle the matter, nor did BROWN he [sic] reach any agreement with WEEMS on the settlement of the matter, as he had nothing to do with the negotiations and settlement of the. issues against CASCADE INSURANCE COMPANY.[46]

. . . .

To a direct question, BROWN indicated that he never had any specific conversation with RON WEEMES [sic] with regard to the CASCADE matter and more particularly, never discussed with WEEMES [sic] anything concerning specific negotiations to settle the matter.

WEEMS would come by his office on occasion and they would discuss a number of things, to include other clients and other matters, and there was never any specific discussions of what it would take to resolve the litigation against DAVID DISIERE.

JOE CAGE on occasion came with RON WEEMS to the department. BROWN did not recall any "one, two, three, . . . concerning what it would take to settle the case."[47]

- *Burton's Notes State:*

  Weems—come to see he and Kip Wall.
  Peek in and say hello.[48]

. . . .

---

[46] Burton's Form 302 at 4-5.

[47] Burton's Form 302 at 7.

[48] Burton's Interviee Notes at 2.

Weems—Did he talk with him—"specific negotiations"—

Would come by—discuss lots of things—other clients, other matters,

No specific discussion

No specific negotiations

Cage with Weems—Don't recall any

one, two three . . . concerning what it would take to settle the case.[49]

COUNT 51:

- *The Indictment Charges:*

BROWN falsely stated that he met with EDWARDS at EDWARDS' office but the conversations only related to political matters and he, BROWN, was delivering an "innocuous" form to EDWARDS when in truth and in fact BROWN well knew that he met with EDWARDS at EDWARDS' office to discuss more than political matters. In fact, BROWN specifically discussed strategical issues involving David Disiere and the Cascade Estate.[50]

- *The 302 States:*

To a specific question, BROWN indicated that he has met with EDWIN EDWARDS before, at EDWARDS' office.

He specifically indicated that on one occasion, EDWARDS asked him to bring a "form" by for EDWARDS. BROWN was going to his wife's restaurant and it was close to EDWARDS' office, so he indicated to EDWARDS he would bring the form by and visit with him.

---

[49] Burton's Interview Notes at 6-7.

[50] Ind. at 46.

To a direct question, BROWN indicated that the form had nothing to do with CASCADE INSURANCE COMPANY, or any actions involving DAVID DISIERE.

His conversation with EDWARDS in the office related to political matters and what was going on in State Government and it had nothing to do with CASCADE INSURANCE COMPANY or DAVID DISIERE.

He didn't even recall what the form was but characterized it as "somewhat innocuous."[51]

- *Burton's Notes State:*

E/E—asked for a form—was going out to his wife's restaurant—Leadership challenge—but nothing to do with this matter

Form—?—"*somewhat innocuous.*"[52]

COUNT 54:

- *The Indictment Charges:*

BROWN falsely stated he had "no conversation with anyone about an amount of settlement" concerning the Cascade Insurance Company matter when in truth and in fact BROWN well knew he had conversations with several people about what it would take to settle the Cascade Insurance matter.[53]

- *The 302 States:*

BROWN "had no conversations with anyone about an amount of settlement" concerning the CASCADE INSURANCE COMPANY matter.

---

[51] Burton's Form 302 at 8.

[52] Burton's Interview Notes at 7.

[53] Ind. at 46.

BROWN didn't know when the settlement was made and didn't know how much the case was settled for.[54]

- *Burton's Notes State:*

No conversation with anyone about any amount of settlement.

Didn't know then and doesn't know now the settlement amount.[55]

COUNT 55:

- *The Indictment Charges:*

BROWN falsely stated that he had never discussed specifics of a settlement regarding Cascade Insurance Company with Judge Sanders when in truth and in fact BROWN well knew that he had discussed specifics of a settlement regarding Cascade Insurance Company with Judge Sanders.[56]

- *The 302 States:*

BROWN never discussed with Judge SANDERS the specifics of the settlement regarding CASCADE INSURANCE COMPANY.[57]

Again, BROWN indicated that he had contact with SANDERS from time to time; however, he never met with or discussed with SANDERS the matter of DAVID DISIERE.[58]

---

[54] Burton's Form 302 at 9.

[55] Burton's Interview Notes at 8.

[56] Ind. at 46.

[57] Burton's Form 302 at 9.

[58] Burton's Form 302 at 10.

- *Burton's Notes State:*

  Never discussed with Sanders the specifics of the settlement.[59]

  . . . .

  Never met with Sanders re Disiere[60]

Based on this comparison, we are satisfied that Burton's notes do not constitute *Brady* material with respect to Count-s 48, 51, 54, and 55. The notes are neither (1) favorable to the defense; nor (2) material to Brown's guilt or punishment as to those counts.[61] The 302 report to "hick Brown had access during the trial is almost identical to Burton's rough interview notes. If anything, disclosure of the notes would have supported the accuracy of the 302 and corroborated Agent Burton's testimony. Moreover, we are not persuaded that Brown could have used the notes in preparation of his defense any more effectively than the virtually identical 302. Finally, given that Burton's notes are fully consistent with the 302, nondisclosure of the notes certainly did not "undermine confidence in the outcome at trial." For these reasons, we conclude that Brown was not denied due process under *Brady* with respect to Counts 48, 51, 54, and 55, and therefore reject his *Brady* arguments with respect to those counts.

---

[59] Burton's Interview Notes at 9.

[60] Burton's Interview Notes at 9.

[61] *See United States v. Martin*, 565 F.2d 362, 364 (5th Cir. 1978) (holding that an FBI agent's rough notes of an interview of the defendant were not *Brady* material because there was no independent showing that they contained evidence that was material to the defendant's guilt or innocence).

We now compare Burton's notes to the 302 as to the more problematic Count 50.

COUNT 50:

- *The Indictment Charges:*

  BROWN falsely stated that although he knew EDWARDS was representing Disiere in some way, he never had any discussions with EDWARDS concerning settlement issues or what it would take to settle the matter between the Estate of Cascade Insurance Company and David Disiere when in truth and in fact BROWN well knew he had discussions with EDWARDS concerning settlement issues involving the Cascade Estate and David Disiere.[62]

- *The 302 States:*

  BROWN believed that EDWIN EDWARDS was linked to the settlement issues in some way.

  BROWN recalled receiving a telephone call from EDWIN EDWARDS, who indicated that he had been hired by DISIERE to try and resolve the outstanding issues of CASCADE, and had been placed on what BROWN recalled was a $10,000 retainer.

  He characterized EDWIN EDWARDS as an "advisor to CASCADE and DISIERE," but did not know EDWARD's [sic] specific role in the settlement process.

  His conversation with EDWIN EDWARDS was a request for BROWN to provide EDWARDS with some background information concerning CASCADE, the suit against CASCADE, and the outstanding litigation.[63]

  . . . .

---

[62] Ind. at 46.

[63] Burton's Form 302 at 6-7.

With regard to EDWIN EDWARDS' part in the litigation, no one ever told him why they hired EDWIN EDWARDS, but it was his recollection that EDWARDS indicated to him that he had been hired to try and resolve the matter.[64]

. . . .

EDWIN EDWARDS called BROWN on several occasions. Again, the initial call concerning CASCADE INSURANCE COMPANY was to inform him of the fact that he had been hired to help resolve the matter and EDWARDS merely wanted some background information concerning CASCADE INSURANCE COMPANY and DAVID DISIERE. EDWARDS may have asked him for information concerning the lawsuit that was filed by WEEMS against Judge SANDERS; however, *there was never any discussion with EDWARDS concerning settlement issues or what it would take to settle the matter.*

BROWN indicated that any decision with regard to settlement was that of Judge SANDERS, and BROWN would have no authority, and the judge would make the final decision regarding any litigation or settlement in the matter.[65]

. . . .

With regard to EDWIN EDWARDS, BROWN believed that EDWARDS was paid a $10,000 retainer fee "to bring this thing to and [sic] end," however BROWN didn't specifically know what role EDWIN EDWARDS had in bringing it to an end.

BROWN indicated that we would have to ask ED GONZALES about that, as he was the center of the suit

---

[64] Burton's Form 302 at 7.

[65] Burton's Form 302 at 7-8 (emphasis added).

and the settlement and BROWN didn't know whether GONZALES was a friend of EDWARDS.[66]

. . . .

- *Burton's Notes State:*

  Edwin Edwards

  [line drawn to connect]

  In some way connected—or when he came in, but *advisor*, to Cascade+Disiere Don't know his role[67]

  . . . .

  They never told him why they hired him

  Was aware of Edwards being a part of the team hired to try to resolve this matter[68]

  . . . .

  Edwin Edwards—called Brown on several occasions—

  —Wanted Background—re case—

  —More on lawsuit—confrontation with Weems—also

  Decision that Judge would make—

  He would have no authority+Judge would make the final decision.[69]

  . . . .

---

[66] Burton's Interview Notes at 11.

[67] Burton's Interview Notes at 5.

[68] Burton's Interview Notes at 6.

[69] Burton's Interview Notes at 7.

E/E 10,000.00 retainer fee to bring this thing to an end.

Don't know what role E/E had in bringing it to an end—

Have to ask Gonzales - He was in the center of the lawsuit and the settlement Don't know if he is a friend of *Edwards*[70]

Count 50 charges Brown with falsely stating to Burton that "he never had any discussions with EDWARDS concerning settlement issues or what it would take to settle the (Cascade] matter."[71] Similarly, the 302 states that Brown stated that "there was never any discussion with EDWARDS concerning settlement issues or what it would take to settle the matter."[72] However, there is no corresponding statement to that effect in the notes.

Nevertheless, even if this discrepancy is sufficient to entitle Brown to the notes under Brady, which we do not decide, we hold that any error the district court may have committed in refusing to compel production of the notes as to Count 50 was harmless. *Brady* is based partly on a defendant's need to know any exculpatory evidence, and holds that suppression of requested information favorable to an accused violates due process.[73] However, *Brady* "is limited by the harmless error rule, and does not compel reversal when the defense was able to adequately prepare his case.[74]

---

[70] Burton's Interview Notes at 11 (emphasis in original).

[71] Ind. at 46.

[72] Burton's Form 302 at 8.

[73] *See Brady v. Maryland*, 373 U.S. 83, 87-88 (1963); *see also United States v. Garcia*, 917 F.2d 1370, 1375 (5th Cir. 1990); *United States v. Cochran*, 697 F.2d 600, 607 (5th Cir. 1983).

[74] *Garcia, 917 F.2d at 1375; see* also Cochran, 697 F.2d at 607.

As to Count 50, Brown attempts to persuade this court that a swearing match took place at trial between Agent Burton and himself as to whether Brown actually made the statement at issue. Our review of the record indicates otherwise. On direct examination, defense counsel asked Brown, "[D]id you talk to Edwin Edwards about the settlement issues?"[75] Brown responded, "I never did because I didn't know the settlement issues."[76] Brown then explained that he understood Burton's question to be whether Brown had talked with Edwards about the final settlement that was ultimately reached in the Cascade matter.[77] Brown's defense was not that he never made this statement to Agent Burton, but that his negative answer to Burton's question, viewed in this light, was true. The jury heard this testimony and rejected it. The notes do not make Brown's alleged interpretation of Burton's question any more probable. Therefore, we hold that any error the district court may have committed in refusing to order production of the notes as to Count 50 was harmless.

III.

Brown next argues that the district court violated his rights under the Confrontation Clause of the Sixth Amendment by refusing to allow the defense to question Agent Burton about the contents of his notes and by offering jury instructions as to why, the notes were not before the jury. Limitations on the scope and extent of cross-examination are reviewed for abuse of discretion.[78]

As discussed above, Agent Burton testified at trial about his interview of Brown. Burton used his 302 to refresh his memory, but the 302 was not admitted into evidence. "On

---

[75] R. at 2550.

[76] *Id.*

[77] *Id.*

[78] *See United States v. Sudderth*, 681 F.2d 990, 996 (5th Cir. 1982).

cross-examination, Brown's attorney extensively questioned Burton about his procedures for recording interviews, including his note-taking procedures and preparation of 302 reports.

Defense counsel then asked Burton where his notes were, knowing they were with the court.[79] The government objected, and the district court again sustained the objection. A side-bar followed, at which defense counsel informed the court that he wanted it to instruct the jury that he did not have the notes because the court had ruled that the defense was not entitled to them.[80] Brown's counsel explained that he thought that "the jury ought to understand I don't have the notes and can't show them to (Agent Burton."[81] Accordingly, the district court instructed the jury:

> Ladies and Gentlemen, before trial, we had a pretrial motion in limine as to whether handwritten notes that are recorded contemporaneously with the F.B.I. interview are something that needs to go to the defense lawyers, and the law in this circuit is they do not because what they get is the finished product, the typed product. In some cases the Court is asked to determine whether the typed, finished product is accurate based on the handwritten notes, and that procedure was followed before this trial. The notes were never made available to defense counsel, so he cannot present them to you or use them to cross-examine this witness with. He asked me to explain that procedure to you.[82]

Brown's counsel moved for a mistrial on the ground that, by so instructing the jury, the district court has vouched for

---

[79] R. at 1604-05.

[80] R. at 1606-08.

[81] R. at 1606.

[82] R. at 1609-10.

the accuracy of the 302.[83] The district court rejected the motion for a mistrial.[84] Brown's counsel then requested that the court give a curative instruction.[85] As a result, the court instructed the jury that:

> [A]s to whether the 302 is accurate or whether I have reviewed anything, my determination of anything is totally irrelevant. I did not intend to tell you that [the 302] was accurate because that is not within my province. You need to determine the credibility of the witness . . . To the extent that I told you anything contradictory to your job, please ignore that.[86]

Later in the cross-examination, defense counsel asked Burton whether his handwritten notes contained specific statements that Burton attributed to Brown in the 302. The government objected, and the court upheld the objection, instructing counsel to " [s]tick to the 302."[87]

Brown contends that both the district court's refusal to allow the defense to examine Burton on the contents of his notes and the district court's instruction violated Brown's rights under the Confrontation Clause of the Sixth Amendment. Brown maintains that the district court, by vouching for the accuracy of the 302, went beyond instructing the jury, as he requested it to do, that Brown did not have access to the notes. Brown also argues that the court's curative instruction was inadequate to remove the "taint" of its earlier instruction.

The Sixth Amendment of the United States Constitution guarantees criminal defendants "the right . . . to be confronted

---

[83] R. at 1621-22.

[84] R. at 1624.

[85] R. at 1624-25.

[86] R. at 1625.

[87] R. at 1651-52.

with the witnesses against him." This right is intended "to secure for the opponent the opportunity of cross-examination."[88]

Based on our review of the record, we are satisfied that the district court's limitation of Burton's testimony and its instruction as to the whereabouts of the notes did not violate Brown's Sixth Amendment rights. First, the district court allowed Brown substantial leeway in questioning Burton on his note-taking procedures and report preparation. As the district court pointed out in its January 2001 post-trial order, Brown was able to impeach Burton's ability to record interviews accurately by disparaging Burton's command over articles (such as "an" versus "the") and his ability to write things down and copy things correctly.[89] In addition, we conclude that the district court's instruction accurately described the disclosure process, as Brown requested, and did not improperly vouch for the accuracy of the 302. Even assuming, *arguendo*, that the instruction stated more than simply *where* the notes were, but also *whether* they supported the 302, the court's curative instruction adequately cured any defect in the original instruction. For these reasons, we hold that the district court did not abuse its discretion in limiting Burton's testimony or in instructing the jury on the whereabouts of Burton's notes.

IV.

Brown next asserts that the district court abused its discretion by excluding the testimony of C.J. Blache, a witness that the defense hoped would impeach Agent

---

[88] *Davis v. Alaska*, 415 U.S. 308, 315-16 (1974) (emphasis omitted from original) (internal quotations omitted).

[89] R. at 2456-58.

Burton's ability to produce accurate 302 reports. We review the district court's exclusion of evidence under an abuse of discretion standard.[90]

The defense argues that Blache would have testified that another FBI agent, Karen Gardner, prepared a 302 report in an earlier prosecution that had a number of errors in it. Agent Gardner prepared the report from her notes, and Agent Burton signed it. The defense maintains that Blache's testimony would have supported its theory that Burton does not prepare accurate 302 reports.

As an initial matter, we briefly address the government's position that Brown did not properly preserve this issue for appeal because he did not present the district court with a written proffer of Blache's testimony. Federal Rule of Evidence 103(a)-(a) (2) provides that:

> [e]rror may not be predicated upon a ruling which admits o excludes evidence unless a substantial right of the party Is affected, and . . . [i]n casts the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.[91]

An oral proffer may be sufficient to preserve an error for appellate review.[92]

Based on our review of the record, we find that the defense counsel provided the court with an adequate oral description of Blache's testimony. The district court definitively excluded the testimony before counsel stated he would submit a written proffer.[93] As the Advisory Committee Notes to Rule 103

---

[90] *See Carson v. Polley*, 689 F.2d 562, 572 (5th Cir. 1982).

[91] Fed. R. Evid. 103(a)-(a) (2).

[92] *See United States v.Gonzalez*, 700 F.2d 196, 201 (5th Cir. 1983).

[93] R. at 33-34.

make clear, "[w]hen the ruling is definitive, a renewed objection or offer of proof at the time the evidence is to be offered is more a formalism than a necessity." Accordingly, this issue is properly before us on appeal.

Turning to the merits, Blache's testimony would have tended to establish that Gardner prepared an inaccurate 302 in an earlier, related case. Agent Burton did not author the report, and his notes were not used in its preparation. Burton, a back-up agent for purposes of that interview, signed the report after Gardner prepared it from her notes. The district court did not abuse its discretion in excluding Blache's testimony as irrelevant to the issue of how carefully Burton. takes notes and then uses those notes to prepare 302 reports.

V.

Brown next maintains that the government produced insufficient evidence to support his conviction for making a false statement under Count 51 of the indictment. Specifically, Brown argues that the prosecution failed to establish that his statement, even assuming it was false, was material to any decision of the FBI. In reviewing the sufficiency of the evidence, this court must determine "whether a reasonable trier of fact could find that the evidence establishes guilt beyond a reasonable doubt."[94]

As the Supreme Court explained in *United States v. Gaudin*,[95] "materiality' is an element of the offense that the Government must prove." To be "material," the statement must have "a natural tendency to influence, or [be] capable of influencing, the decision of the decision-making body to which it was addressed."[96] A conviction under 18 U.S.C.

---

[94] *United States v. Davis*, 752 F . 2d 963, 968 (5th Cir. 1985) (internal quotations omitted).

[95] 515 U.S. 506, 509 (1995).

[96] *Id.* (internal citation omitted).

§ 1001 must be reversed if the evidence does rot support a finding of materiality beyond a reasonable doubt, even if it does establish the falsity of the statement made.[97]

Count 51 of the indictment charges that "BROWN falsely stated that he met with EDWARDS at EDWARDS' office but the conversations only related to political matters . . . . fact, BROWN specifically discussed strategical issues involving David Disiere and the Cascade Estate."[98] Brown argues that this Count charges him with lying about talking with Edwards about Cascade *in Edwards' office*, only and that there was insufficient proof at trial to establish why the location of this conversation was material to the FBI's investigation.

The district court rejected Brown's interpretation of Count 51 in its January 2001 post-trial order. The court explained that:

> the Court cannot accept Mr. Brown's contention that the focus of Agent Burton's question was *not* whether Mr. Brown had *that particular* long and involved conversation regarding Cascade but rather whether "such a conversation took place *in Edwards' office*. In light of the tape recording and Burton's and Brown's testimony, the jury readily could have found that Mr. Brown attempted to distance himself from this particular conversation, which reflected a detailed, personal knowledge of, and involvement in, the Cascade matter . . . [T]here was sufficient evidence for the jury to conclude that Brown had intentionally lied in order to 'influence . . . the . . . decision[s] of Agent Burton by distancing himself from this particular conversation,

---

[97] *See id.* at 511.

[98] Ind. at 46.

> which, by its detail, could have given investigators reason to believe that he was a significant actor in a series of events under criminal investigation.[99]

We agree with the district court that the jury was entitled to conclude that the focus of Agent Burton's question was not on the location of Brown and Edwards but on whether a particular conversation, identified by its time and location, took place. Once the jury viewed the question in this light, the falsity of the answer was obviously material to the investigation for the reasons that the district court explained. Therefore, we hold that there is sufficient evidence to support Brown's conviction on Count 51.

VI.

Brown also contends that the district court abused its discretion in ordering an anonymous jury. We review the district court's decision to empanel an anonymous jury for abuse of discretion.[100]

This circuit first addressed the issue of anonymous jury empanelment in *United States v. Krout*.[101] In *Krout*, this court held that an anonymous jury is constitutional "when there is strong reason to believe the jury needs protection and the district court takes reasonable precautions to minimize any prejudicial effect: on the defendant and to ensure that his

---

[99] R. at 2468-69 (emphasis in original).

[100] *See United States v. Salvatore*, 110 F.3d 1131, 1143 (5th Cir. 1997).

[101] 66 F.3d 1420, 1426-28 (5th Cir. 1995).

fundamental rights are protected."[102] This court then identified several factors that may justify use of an anonymous jury:

> (1) the defendants' involvement in organized crime; (2) the defendants' participation in a group with the capacity to harm jurors; (3) the defendants' past attempts to interfere with the judicial process or witnesses; (4) the potential that, if convicted, the defendants will suffer a lengthy incarceration and substantial monetary penalties; and, (5) extensive publicity that could enhance the possibility that jurors' names would become public and expose them to intimidation and harassment.[103]

None of these factors is dispositive; rather, the decision to empanel an anonymous jury should be made on the totality of the circumstances.[104]

In this case, the district court ordered an *anonymous jury* in its August 10, 2000 order. The *district court found* that three of the five *Krout*, factors were present in this case.[105] First, the court found that "several individuals in the case at bar have already proven their ability to corrupt the legal system."[106] The court noted that two co conspirators indicated with Brown plead guilty to witness tampering in connection with the Cascade lawsuit.[107] These facts, among others, the court explained, raise concern that the defendants would attempt to interfere with the judicial process or witnesses.[108]

---

[102] *Id.* at 1427 (quoting *United States v. Wong*, 40 F.3d 1347, 1376 (2d Cir. 1994) (internal quotation marks omitted).

[103] *Id.*

[104] *See United States v. Branch*, 91 F.3d 699, 724 (5th Cir. 1996).

[105] R. at 1759-63.

[106] R. at 1761.

[107] R. at 1760-6.

[108] R. at 1760-6.

Second, the court observed that the defendants, if convicted, faced lengthy sentences and massive fines.[109] Finally, the court explained the "enormous local and national publicity surrounding the case" against a former state governor and the then-current Insurance Commissioner militated in favor of ordering an anonymous jury.[110] The court therefore ordered that the names, addresses, and places. of employment of the jurors be withheld. The court provided the defendants with substantial information about the jurors "through an extensive voir dire and an exhaustive 42-page juror questionnaire."[111]

In light of the unique circumstances of this case, the district court reasonably concluded that three of the *Krout*, factors discussed above were present in this case.[112] Furthermore, the

---

[109] R. at 1760.

[110] R. at 1760.

[111] R. at 1762.

[112] The district court's reasoning with respect to the presence of the fifth *Krout*, factor is consistent with this court's decision in *United States v. Brown*, 218 F.3d 415, 429 (5th Cir. 2000) . In that opinion, this court upheld the constitutionality of the gag order that the district court placed on the parties and lawyers in this case. *Id.* A panel of this court reasoned that:

> [t]he enormous local and national publicity surrounding the cases, the presence of three related trials, which created a heightened and somewhat unique danger of tainting any one of the three juries, as well as the parties' self-proclaimed willingness to use the press for their full advantage, justified the district court's conclusion that there was at least a 'substantial likelihood' that allowing further extrajudicial statements by the parties would materially prejudice the court's ability to conduct a fair trial.

Id.

In another ruling by this court in the present case, *United States v. Brown*, 250 F.3d 907, 922 (5th Cir. 2000), this court struck down as unconstitutional a portion of the district court's August 9, 2000 order forbidding the press to research independently the identity of the jurors in this trial. However, the substantive merits of the anonymous jury order were not at issue in that case. *Id.*

court's efforts to provide the defendants with questionnaires and voir dire adequately protected the defendants' rights and permitted them to select a jury intelligently. Therefore, we conclude that the district court did not abuse its discretion in ordering an anonymous jury.

VII.

Finally, Brown argues that the wiretap evidence obtained from Edwards' home and office was unlawful. The evidence upon which the government relied at trial to prove the falsity of Brown's statements consisted primarily of taped conversations between Brown and Edwards that were obtained through electronic surveillance of Edwards' home and office. Judge John Parker authorized this surveillance in October and December 1996, respectively.

At trial, the defendants jointly moved to suppress the fruits of the surveillance on the grounds that (1) there was no probable cause to support the warrants under Title III; and (2) the government failed to minimize interceptions as required by 18 U.S.C. § 2515. In September 2000, the district court denied the motion, basing its decision in part upon an earlier ruling by Judge Polozola. Brown now raises on appeal the same objections to the admissibility of the tapes.

A.

Brown's first argument is that insufficient evidence was presented in the warrant affidavit submitted to Judge Parker to support the issuance of the warrants to wiretap Edwards' home and office. Brown asserts that the affidavits submitted to Judge Parker were based on information provided by an informant that the government knew to be untrustworthy and on conjectural interpretations of taped conversations. Brown maintains that, at the very least, he was entitled to a hearing

to assess the basis of these warrants under *Franks v. Delaware*.[113]

Two panels of this court have recently resolved this issue in *United States v. Brown*[114] and *United States v. Edwards*.[115] In those cases, this court upheld the same warrants at issue here. In accordance with *Edwards*, and *Brown*, we hold that there was probable cause to sustain the issuance of the warrants.

B.

Brown next contends that the government violated its statutory obligation under 18 U.S.C. § 2515 to minimize unrelated interceptions. This issue is unique to the present appeal. This court reviews the district court's determination of the reasonableness of minimization efforts for clear error.[116]

A brief overview of the FBI's investigation of Edwin Edwards is necessary to evaluate Brown's minimization claims. The government sought permission to tap Edwards' phones based on allegations of bribery. One allegation was that Edwards was receiving pay-offs from Texas businessmen who wanted to build and operate a juvenile detention facility in Jena, Louisiana. The named interceptees in connection with this alleged scheme were Edwards, Cecil Brown, Kenneth Pitre, and Richard Stalder (then Secretary of Louisiana's Department of Corrections). Another allegation was that Edwards had received bribes from 'other Texas businessmen who sought approval to develop waste disposal saes in Louisiana. Edwards, Cecil Brown, and Guy

---

[113] 438 U.S. 154, 171-72 (1978)).

[114] No. 01-30771, 2002 U.S. App. LEXIS 14188, at *4-28 (5th Cir. Aug. 9, 2002).

[115] __ F.3d __ (5th Cir. August 23, 2002).

[116] *See United States v. Wilson*, 77 F.3d 105, 112 (5th Cir. 1996).

Thompson, an owner of a Texas business under investigation, were named as interceptees. A few days after the government initiated electronic surveillance of Edwards' home telephone, the government intercepted the first of several calls related to the Cascade matter.[117]

Federal law "requir[es] electronic surveillance to 'be conducted in such a way as to minimize the interception of communications not otherwise subject to interception.'"[118] The government's efforts to minimize interception of non-pertinent conversations "must be 'objectively reasonable' in light of the circumstances confronting the interceptor."[119] This court has set forth a three-part test to determine whether the government's minimization efforts meet this standard: "(1) the nature and scope of the criminal enterprise under investigation; (2) the Government's reasonable inferences of the character of a conversation from the parties to it; and 37 the extent of judicial supervision."[120]

Although 18 U.S.C. § 2515 requires minimization, it does not "require[] government agents to avoid intercepting all nonrelevant conversations when conducting a wiretap investigation."[121] On the contrary, the practical necessities of

---

[117] The government began electronic surveillance of Edwards' home telephone on October 18, 1996. The government intercepted the first Cascade-related calls on October 21, 1996. On December 17, 1996, Judge Parker granted the government's application for extension of the October 1996 warrant order to authorize interception of Cascade-related conversations. The extension application specifically named Brown as an interceptee. R. at 2139.

[118] *United States v. Bankston*, 182 F.3d 296, 307 (5th Cir. 1999) (quoting 18 U.S.C. § 2518(5)), *rev'd on other grounds*, 531 U.S. 12 (2000).

[119] *Id.*

[120] *Id.* (citing *United States v. Hyde*, 574 F.2d 856, 869 (5th Cir. 1978)) (internal quotation marks omitted).

[121] *Id.* (internal citations omitted).

conducting a wiretap may, in some circumstances, inevitably lead to the interception of some conversations outside the scope of the wiretap order:

> [T]he only feasible approach to minimization is the gradual development, during the execution of a particular wiretap order, of categories of calls which most likely will not produce information relevant to the investigation. . . Until such categories become reasonably apparent, however, interception of all calls will be justified under the wiretap authorization.[122]

Accordingly, the government may reasonably intercept more calls during the *initial phase of an* investigation, when the precise scope of and participants in the criminal scheme have not yet been identified.[123] This consideration is especially strong where the criminal enterprise under investigation is a large and sophisticated conspiracy, and the purposes of the intercept order is to learn the identities of conspirators and define the reach of the conspiracy.[124]

The district court rejected Brown's motion to suppress the wiretap evidence in its September 29, 2000 order. The court found that it was "reasonable to believe that the Government had yet to gather a complete picture of the Jena Prison and Evergreen Waste Disposal schemes at the time of the Edwards' home wiretap."[125] It further reasoned that "there

---

[122] *United States v. Hyde*, 574 F.2d 856, 870 (5th Cir. 1978) (quoting *United States v. Scott*, 516 F.2d 751, 754-55 (D.C. Cir. 1975)).

[123] *See United States v. Kahn*, 415 U.S. 143 (1974) (approving an order authorizing interception of pertinent conversations between a named target and "others as yet unknown"); *Hyde*, 574 F.2d at 862, 869-70 ("one of the objects of wiretapping is to ascertain the full extent of participation in criminal activity, and we need not limit retrospectively the pool of potential defendants.").

[124] *See Hyde*, 574 F.2d at 869 ("Large and sophisticated conspiracies may justify more electronic surveillance than a single criminal act.").

[125] R. at 2142.

was probable cause to believe that a wiretap on Edwards' phone would reveal the presence of additional, previously unknown conspirators to and dimensions of the scheme."[126] The district court also noted that Judge Parker received ten-day reports, updating the information received from the intercepted calls.[127]

Based on our review of the record, we conclude that the district court did not clearly err in finding that the government did not have a "complete picture" of the participants in o: scope of the prison and waste disposal conspiracies it was investigating when it intercepted the Cascade-related phone calls. The government's October 1996 wiretap application indicates that the government believed that it still had much to learn about the alleged schemes. The government requested wiretap authorization in order to intercept communications "that reveal the manner in which Edwards, [Cecil] Brown, Stalder, Pitre, Thompson, and other persons yet unknown and unidentified, participate in the specified offenses, and that reveal the identities of their co-conspirators, their places of operation, and the nature of the conspiracy involved therein . . . ."[128] The summaries of the Confidential Witness tapes and the Cecil Brown wiretap in the Affidavit show that these sources offered the government only a snapshot of the dimensions of and participants in the prison and waste disposal schemes.[129] Contrary to Brown's position, the fact that the intercepted Cascade-related calls involved the state Insurance Commissioner does not facially make their interception objectively unreasonable. On the contrary, the FBI's investigation targeted some of Louisiana's top public officials to determine their involvement in a broad

---

[126] R. at 2142.

[127] R. at 2140.

[128] Application Oct. 1, 1996, at 5.

[129] *See* R. at 2142.

scheme of public corrupt ion whose parameters were not then fully defined.

In addition, the record reveals that the government minimized interception of numerous conversations. The Daily Intercept Reports show that, as the surveillance progressed, the government minimized a greater percentage of calls, in keeping with the approach approved in *United States v. Hyde*.[130] Moreover, many of the intercepted calls about which Brown complains were short, making minimization difficult.[131]

Finally, as the district court noted, Judge Parker received reports on the investigation every ten days, in which he was informed that the government was intercepting communications involving Brown, Sanders, and Weems, among others.[132] In fact, the very first of these reports listed Brown and Judge Sanders as people whose calls the government had intercepted.[133] In light of, these factors, the district court did not clearly err in finding that the government's *interception of* the Cascade-related calls was objectively reasonable. Therefore, we affirm the district court's denial of Brown's motion to suppress the fruits of wiretap.

VIII.

For the reasons stated above, Brown's convictions on all counts are hereby AFFIRMED.

AFFIRMED.

---

[130] 574 F.2d 856, 870 (5th Cir. 1978); *see* R. at 2140. This fact alone is not determinative, however. *See Scott v. United, States*, 436 U.S. 128, 140 (1978) (explaining that the use of percentages may provide assistance in determining whether the government's minimization was reasonable, but that "blind reliance" on statistics is not a "sure guide to a correct answe").

[131] *See* R. at 2140.

[132] *See* R. at 2139-40.

[133] *See* R. at 728, 2139.

APPENDIX C

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA
(Section "N" E.D. La.)

CRIMINAL ACTION
NO.99-151-B-M2

UNITED STATES OF AMERICA

VERSUS

JAMES HARVEY BROWN, *et al.*

ORDER AND REASONS

Defendants James Harvey Brown, Edwin Washington Edwards, and Ronald R. Weems were charged with one count of conspiracy, 36 counts of mail fraud, three counts of wire fraud, one count of witness tampering, and two counts of insurance fraud in connection with the settlement of the Cascade Insurance Company matter. Following a three week jury trial, the defendants were acquitted of all 43 of these charges.

Defendants Brown and Weems were also charged with making fall e statements during separate interviews with FBI Agent Harry Burton who was investigating the Cascade matter. Tape recordings of the intercepted conversations that formed the basis of the false statement counts were played numerous times in Court, the jury received transcripts of these recordings, and Burton, Brown, and Weems all testified as to their versions of the allegedly-false statements. Mr. Brown's counsel successfully prevented the Government from presenting Agent Burton's Form 302 report of his interview of Brown to the jury, but did use the form to impeach

Agent Burton's testimony and to refresh his recollection. Defendant Weems was acquitted of his false statement charge, while Defendant Brown was convicted of making seven false statements and acquitted of making six others.

Defendant Brown has filed three post-trial motions: a Motion for Judgment of Acquittal on Counts 44, 46, 51, 54 and 55; a Motion for a New Trial on Counts 44, 46, 48, 50, 51, 54 and 55; and a Post-Trial Motion to Compel Production of Agent Burton's Notes. For the following reasons, the Court GRANTS Defendant Brown's Motion for Judgment of Acquittal with respect to Counts 44 and 46 and DENIES Defendant's Motions in all other respects. Familiarity with the facts of the case is assumed.

I. *Standard of Review.*

A motion for judgment of acquittal challenges the sufficiency of the evidence to convict. FED. R. CR. P. 29; *United States v. Moreno*, 185 F.3d 465, 470 (5th Cir.1999), *cert. denied, 528* U.S.1095,120 S. Ct. 835,145 L. Ed. 2d 702 (2000). The applicable standard of review is "whether the evidence, as viewed in the light most favorable to the verdict, would permit a rational trier of fact to find [the defendant] guilty beyond a reasonable doubt." *United States v. Guerrero*, 169 F.3d 933, 939 (5th Cir. 1999) (citations omitted). The Court must draw all reasonable inferences in support of the verdict. Id. (citation omitted). This standard of review is narrow and "gives full play to the responsibility of the Crier of fact fairly to resolve conflicts in testimony, to weigh the evidence and to draw reasonable inferences from basic facts to ultimate facts." *United States v. Millsaps*, 157 F.3d 989, 994 (5th Cir. 1998) (citation omitted). In addition, the Court must bear in mind that it is the jury's role to judge the credibility and evaluate the demeanor of witnesses and to decide how much weight should be given their testimony. *Id.*

Federal Rule of Criminal Procedure 33 gives district courts discretion *to* "grant a new trial to [a] defendant if the interests of justice so require." Motions for new trial are disfavored, and are granted only with great caution. *United States v. O'Keefe*, 128 F.3d 885, 898 (5th Cir.1997), *cert. denied*, 523 U.S. 1078,118 S. Ct. 1525, 140 L. Ed. 2d 676 (1998). "The remedy of a new trial is rarely used; it is warranted 'only where there would be a miscarriage of justice' or 'where the evidence preponderates heavily against the verdict." Id. (quoting *United States v. Andrade*, 94 F.3d 9,14 (1 st *Cir. 1996)). See also United States v. Simms*, 508 F. Supp. 1 188, 1202 (W.D. La. 1980).

II. *Motion for Judgment of Acquittal.*

Mr. Brown argues that the evidence was insufficient to support his convictions on Counts 44, 46, 51, 54 and 55. As described in detail in the following section, the Court agrees with Mr. Brown with respect to Counts 44 and 46, but disagrees with respect to Counts 51, 54 and 55.

A. *Count 44.*

Mr. Brown moves for judgment of acquittal with respect to Count 44, which charges that he "falsely stated that he was only vaguely familiar with the Cascade Insurance Company when in truth and in fact [he] well knew *that he* was very familiar with the Cascade Insurance Company."

At trial, FBI Agent Harry Burton, whose interview provided the foundation for the false statement counts against Brown, testified that, when he started the interview, he told Brown that he wanted to talk to him about "[h]is knowledge of David J. Disiere in his operations of Cascade Insurance Company." 9127100 Tr. Burton Cross p. 22 lines 10-13. On direct examination, Jim Brown gave a similar account of the interview's opening, testifying that he believed that Agent Burton had stated that the purpose of the interview was to gather information about "how David Disiere ran Cascade

Insurance Company." 10/3/00 Tr. Brown Direct p. 36 lines 23-25. Nowhere in the evidence admitted at trial is there any mention that Brown told Burton that he was "only vaguely familiar with the Cascade Insurance Company." Of course, a substantially similar statement appears in Burton's 302,[1] but, due to the strenuous efforts of Mr. Brown's counsel, this document was never admitted into evidence. Instead, Mr. Brown's counsel used the 302 exclusively "to refresh recollection and [for] impeachment." 9127/00 Tr. Burton Cross p. 31 lines 5-6 (words of Mr. Brown's counsel). Thus, there was no actual evidence that Brown ever made the false statement contained in Count 44.

The Court believes that the jury might have misunderstood a portion of Agent Burton's direct testimony. On direct, a prosecutor asked Agent Burton whether, "prior to" the time he interviewed Mr. Brown, he had made Mr. Brown "aware of the subject matter of the interview . . . ." Responding affirmatively, Agent Burton testified that he *told Mr.* Brown "[t]hat I wanted to talk to [him] with regard to his knowledge of the Cascade Insurance Company and the activities of David Disiere." 9126100 Tr. Burton Direct p. 23 lines 22-25 and p. 24 lines 1-4.[2] Had Mr. Brown told Agent Burton that

---

[1] According to Agent Burton's 302, "BROWN indicated that he was vaguely familiar with CASCADE INSURANCE COMPANY ..." P.1 (capitals in original).

[2] The prosecutor's question was quite unclear, referencing two distinct and one ambiguous time periods: "*At the time* you interviewed Jun Brown, *prior to* that, did you make Jim Brown aware of the subject matter of the interview *before* you interviewed him?" 9126100 Tr. Burton Direct p. 23 lines 22-24. Thus, the jury easily could have believed that Agent Burton's response was directed to the time of the actual interview. A close reading of the transcript, however, indicates that Agent Burton's response was directed to a time several days prior to the interview: "Well, I can't really recall [what he told me at that time]. I called in advance, like I say, two or three days prior to set up an interview with Mr. Brown as a courtesy. . . ." *Id.* p. 24 lines 7-9.

he was "only vaguely familiar" with these subject matters at that point, the Court could find sufficient evidence to uphold the conviction. But, because the admitted evidence shows that Mr. Brown said he was "vaguely familiar" with the way David Disiere operated Cascade, the Court finds no evidence to support the conviction on Count 44, and GRANTS Mr. Brown's Motion for Judgment of Acquittal on this Count.

B. *Count 46.*

Mr. Brown also moves for judgment of acquittal with respect to Count 46, which charges that he "falsely stated that he *was not aware of* any federal civil action that had been contemplated against David Disiere in or about December 1996 when in truth and in fact [he] well knew that there was a federal civil action that had been prepared against David Disiere in December 1996."

At trial, Agent Burton testified that Brown had told him that "he was unaware of the suit until December of 1996." 9/27/00 Tr. Burton Cross p. 45 lines 19-20. This statement would seem to rebut the validity of Count 46. The Court agrees in part with Brown's counsel that this conviction probably arose from an ambiguity contained within the Count. It appears that the Government improperly imported a variation of its standard "on or about" language into Count 46. While the "on or about" language is generally acceptable when it pertains to the timing of a particular act alleged in an indictment, it is not proper under these circumstances where Brown is accused of actually stating that he was unaware that the suit had been contemplated "in or about" December 1996. This problem likely was exacerbated by the Court's otherwise proper instruction on "on or about."[3] Thus, the Court does not

---

[3] The Court gave the following instruction, captioned "On or About":

> You will note that the second superseding indictment charges that certain offenses were committed on or about a specified date. The government does not have to prove that the crime was

agree with defense counsel's statement at oral argument that the ambiguity lay within the question asked by Burton, *see United States v. Moses*, 94 F.3d 1 82,188-89 (5th Cir.1996) (finding evidence insufficient to support conviction where government's question was ambiguous) *and United States v. Migliaccio*, 34 F.3d 1517, 1 525 (10th Cir. 1994), but rather finds that the ambiguity lay in the description of the false statement in the indictment. *See United States v. Brown*, 217 F.3d 247, 256 n. 5 (5th Cir.), *cent. denied*, 121 S. Ct. 415 (2000); *United States v, Threadgill*, 172 F.3d 357, 366 (5th Cir.) (indictment must charge elements without any uncertainty or ambiguity), *cert. denied*, 528 U.S. 871,120 S. Ct.172,145 L. Ed. 2d 146 (1999).

Although Brown's counsel asserts for the first time here that Burton's testimony undermined Count 46,[4] the Court nevertheless is concerned that this testimony and the unartful "in or about" construction of Count 46 fatally confused the jury with respect to this Count. Indeed, the prosecutor's rather mind-boggling attempt to explain this Count at oral argument suggests that the Government itself did not understand that which it wrote. The Court, therefore, finds that the evidence does not support Count 46, and GRANTS Mr. Brown's Motion for Judgment of Acquittal on this Count.

C. *Count 51.*

The Court rejects Mr. Brown's contention that the evidence on Count 51 was insufficient to prove materiality. Count 51 charges that Brown "falsely stated that he met with

---

committed on that exact date, so long as the government proves beyond a reasonable doubt that the defendant committed the crime on a date reasonably near the date stated in the second superseding indictment.

[4] In his Rule 29 motion advanced at the close of the Government's case, Brown's counsel challenged only Count 53 of the false statement counts. This challenge was based on Agent Burton's trial testimony.

EDWARDS at EDWARDS' office but the conversations only related to political matters and he, BROWN, was delivering an 'innocuous' form to EDWARDS when in truth and in fact BROWN well knew that he met with EDWARDS at EDWARDS' office to discuss more than political matters. In fact, BROWN specifically discussed strategical issues involving David Disiere and the Cascade Estate."

In light of the extent and depth of Mr. Brown's and Mr. Edwards' discussion of Cascade-related issues on December 17, 1996,[5] the Court cannot accept Mr. Brown's contention that the focus of Agent Burton's question was *not* whether Mr. Brown had *that particular* long and involved conversation regarding Cascade but rather whether "such a conversation took place *in Edwards' office*." Acquittal Mem. p. 6 (emphasis in original).[6] In light of the tape recording and Burton's and Brown's testimony, the jury readily could have found that Mr. Brown attempted to distance himself from this particular conversation, which reflected a detailed, personal knowledge of, and involvement in, the Cascade matter. Brown is correct that the jury *could* have found that this statement, which he admitted that Burton got right,[7] was mere error on his part, but, as described below, there was sufficient

---

[5] The extent and depth of this conversation are described in detail below.

[6] *See also* Reply Mem. p. 25 (emphasis in original): "The government attempts to portray Count 51 as charging a lie about the *subject matter* of a conversation with Edwin W. Edwards, as distinct from a conversation *in one particular location*."

[7] At no point during his testimony did Mr. Brown deny that he had told Agent Burton that he met with Edwards at Edwards' office and that "the conversations only related to political matters." Count 51. To the contrary, he implicitly vouched for the accuracy of Burton's 302 in front of the jury, testifying that "until I heard these tapes after I was indicted, I would have sworn that, when I went to Governor Edwards's office that day, the only thing we discussed was the U.S. Senate race." 10/3/00 Tr. Brown Direct p. 48 lines 15-18.

evidence for the jury to conclude that Brown had intentionally lied in order to "influence . . . the . . . decision[s]" of Agent Burton by distancing himself from this particular conversation, which, by its detail, could have given investigators reason to believe that he was a significant actor in a series of events under criminal investigation. *See Court's Final* Instruction on Materiality ("A statement is material if it has a natural tendency to influence, or is capable of influencing, a decision of the Federal Bureau of Investigation.") (unobjected to by Brown's counsel). Accordingly, the Court DENIES Mr. Brown's Motion for Judgment of Acquittal on this Count.

D. *Counts 54 and 55.*

The Court also finds sufficient evidence to support Mr. Brown's convictions on Counts 54 and 55. Agent Burton testified that Brown told him that he had "no conversations with anyone concerning an amount of the settlement concerning the Cascade Insurance Company matter" (9/27/00 Tr. Burton Direct p.10 lines 1-3) (Count 54) and that he had "never discussed specifics of a settlement regarding Cascade Insurance Company with Judge Sanders" (9/27/00 Tr. Burton Direct p. 10 lines 17-19) (Count 55), but the tapes demonstrated that he had. Mr. Brown's argument that no evidence supports these counts depends entirely on his attempt to re-write the charge, substituting "the" for "an" and "a" before "settlement." In convicting Mr. Brown, the jury rejected his defense that the "twisting of words of fine distinctions about whether it's 'a settlement' or 'the settlement" (Tr. Brown Closing Argument) proved his innocence, and the Court does not find this semantic argument irrefutably compelling (or even mildlypersuasive) so as to find the jury's determination unsupported by logic and evidence. As discussed in detail below, along with the tapes and the testimony, the jury was able to consider Mr. Brown's demeanor while advancing

his article argument, and this cannot be given short shrift. Accordingly, the Court DENIES Mr. Brown's Motion for Judgment of Acquittal on these Counts.

E. *Not Logically Inconsistent.*

Although Mr. Brown does not expressly argue that his acquittal on the main charges and his conviction on several false statement charges are anomalous, this theory does seem to lie beneath some of his arguments. For example, Brown argues that he was only convicted of the false statement counts because of several of the Court's errors with respect to Agent Burton's 302, which he deems the only evidence against *him on* those counts. His evidence of prejudice is that he was acquitted on the insurance fraud charges, which did not involve the 302. However, Brown simply ignores the enormous impact of—and, in several instances, cavernous incongruity between—his own tape-recorded statements and his explanations of those statements on the witness stand.

After listening to the tapes and hearing his explanations, a reasonable jury could have concluded that the Government failed to prove beyond a reasonable doubt that Mr. Brown had committed fraud but that he had lied to Agent Burton about the events giving rise to the fraud counts.

III. *Motion for New Trial based on Judicial Error.*

Mr. Brown argues, most often for the first time, that the Court committed several errors that impermissibly affected his rights. The Court addresses each alleged error individually, then collectively, below. At this point, however, the Court finds that a brief summary of its conclusions is appropriate.

Mr. Brown's principal argument is that each error, by itself and cumulatively, made it impossible for the jury to fairly evaluate Agent Burton's testimony regarding the false statement counts. The jury's verdict, however, simply does

not bear this theory out, since, in several instances, the jury both rejected Burton's interpretations of statements Brown admitted making *and* accepted Brown's denials of statements that Burton attributed to him in his 302 and on the witness stand. Thus, the jury

- believed Mr. Brown's—and disbelieved Agent Burton's—explanation of what Brown meant when he stated that he was "out of the loop" concerning any settlement issue between LRO and Cascade (Count 41);
- believed Mr. Brown's—and disbelieved Agent Burton's—explanation of what Brown meant when he told Edwin Edwards that he would "tell Bourgeois he's gotta do it."[8] (Govt. Ex. G-540 p. 4) (Count 53);
- believed Mr. Brown's—and disbelieved Agent Burton's—statement that Brown did not know who "drove the [Cascade] settlement" (Count 49);
- flatly rejected Agent Burton's assertion, as memorialized in his 302, that Mr. Brown had told him that he had not had "any specific conversations with BOURGEOIS concerning CASCADE INSURANCE COMPANY and/or DAVID DISIERE" (302 p. 9) (Count 52); and
- flatly rejected Agent Burton's assertion, made during direct examination and suggested by his 302, that Mr. Brown had told him that the only thing he knew about a contingency fee contract for Edward Gonzalez was information he had learned from a Louisiana Assistant Attorney General (Count 56).

In contrast, the fury

- listened to Mr. Brown insist on the stand that "*a* compromise" of the Cascade matter had "nothing to do with *the* settlement," then convicted him on four counts

---

[8] Brown insisted "do it" meant meet with the Disiere people, while Burton insisted it was a directive to settle the Cascade matter.

in which he denied having conversations "concerning settlement issues" (Counts 48 and 50), "about an amount of settlement" (Count 54), and regarding "specifics of a settlement" (Count 55), even after hearing Brown's argument that the truth of these statements turned on the "twisting of words of fine distinctions about whether it's 'a settlement' or 'the settlement"; and

- convicted Mr. Brown of falsely stating to Agent Burton that a particular conversation, during which he discussed Cascade at great length and in great detail, only related to political matters, even after listening to Brown admit on the stand that he had, in fact, made this statement but had simply forgotten that he discussed Cascade that day (Count 51).

These patterns indicate that the jury was attentive, discriminating, and able to competently and thoroughly evaluate the evidence without any undue or improper influence by the Court. Thus, and for the reasons described below, the Court DENIES Mr. Brown's Motion for a New Trial.

A. *Agent Burton's Handwritten Note.*

Mr. Brown argues that he should have been provided with the rough notes Agent Burton took during their interview, which notes were later transferred—or in Brown's view, mistranslated—into the 302. Brown hypothesizes that the 302 varies in meaningful ways from the handwritten notes. Most significant in his mind is whether Burton wrote in his notes that he had asked Brown about "a" settlement or about "the" settlement, since, in his view, the false statement counts against him "depend[ed] on such twisting of words of fine distinctions about whether it's 'a settlement' or 'the settlement' an [sic] 'settlement issues' versus 'settlement negotia tions' and things like that . . . ." Tr. Brown Closing Argument.

The Court will not revisit its priorruling on this issue with respect to the legal rules involved, except to say that it is this Court's understanding that the standard practice in this Circuit is not to provide an agent's rough notes to the defense unless there is a meaningful discrepancy between the notes and the 302. The Court reviewed the notes prior to trial, during trial, immediately following trial, and again for purposes of this motion and still discerns no relevant discrepancy between the notes and the 302.

- *For example*:
  - Count 48 charges:
  - BROWN falsely stated he had never had any specific discussions with RONALD R. WEEMS, an attorney for Disiere, concerning settlement issues associated with Cascade Insurance Company . . . .
  - The 302 states:

    To a direct question, BROWN indicated a knowledge that RON WEEMS was associated with the CASCADE INSURANCE COMPANY as its Attorney of Record. He advised, however, he never had any specific discussions with RON WEEMS concerning settlement issues associated with Cascade. (p. 4)

    and

    To a direct question, BROWN indicated that he never had any specific conversation with RON WEEMES [sic] with regard to the CASCADE matter and more particularly, never discussed with WEEMES [sic] anything concerning specific negotiations to settle the matter.

    WEEMS would come by his office on occasion and they would discuss a number of things, to include other clients and other matters, and there was never any specific discussions of what it would take to resolve the litigation against DAVID DISIERE.

JOE CAGE on occasion came with RON WEEMS to the department. BROWN did not recall any "one, two, three, . . . concerning what it would take to settle the case." (p. 7)

- The notes state:

Weems—Did he talk with him"specific negotiations"—

Would come by—discuss lots of things
—other clients, other matters,
No specific discussion
No specific negotiations

Cage with Weems—Don't recall any

one, two, three . . concerning what it would take to settle the case.

- *For example*:
  - Count 50 charges:

BROWN falsely stated that although he knew EDWARDS was representing Disiere in some way, he never had any discussions with EDWARDS concerning settlement issues or what it would take to settle the matter between the Estate of Cascade Insurance Company and David Disiere . . .

- The 302 states:

BROWN believed that EDWIN EDWARDS was linked to the settlement issues in some way.

BROWN recalled receiving a telephone call from EDWIN EDWARDS, who indicated that he had been hired by DISIERE to try and resolve the outstanding issues of CASCADE, and had been placed on what BROWN recalled was a $10,000 retainer.

He characterized EDWIN EDWA.RDS as an "advisor to CASCADE and DISIERE," but did not know EDWARD's [sic] specific role in the settlement process.

His conversation with EDWIN EDWARDS was a request for BROWN to provide EDWARDS with some *background* information concerning CASCADE, the suit against CASCADE, and the outstanding litigation. (pp. 6-7)

With regard to EDWIN EDWARDS' part in the litigation, no one ever told him why they hired EDWIN EDWARDS, but it was his recollection that EDWA.RDS indicated to him that he had been hired to try and resolve the matter. (p. 7)

EDWIN EDWARDS called BROWN on several occasions. Again, the initial call concerning CASCADE INSURANCE COMPANY was to inform him of the fact that he had been hued to help resolve the matter and EDWARDS merely wanted some background information concerning CASCADE INSURANCE COMPANY and DAVID DISIERE. EDWARDS may have asked him for information concerning the lawsuit that was filed by WEEMS against Judge SANDERS; however, there was never any discussion with EDWARDS concerning settlement issues or what it would take to settle the matter.

BROWN indicated that any decision with regard to settlement was that of Judge SANDERS, and BROWN would have no authority, and the judge would make the final decision regarding any litigation or settlement in the matter. (pp. 7-8)

With regard to EDWIN EDWARDS, BROWN believed that EDWARDS was paid a $10,000 retainer fee "to bring this thing to an end," however [sic] BROWN didn't specifically know what role EDWIN EDWARDS had in bringirg it to an end.

BROWN indicated that we would have to ask ED GONZALES about that, as he was the center of the suit and the settlement and BROWN didn't know whether GONZA.LES was a friend of EDWARDS. (p. 11)

- The notes state:

Edwin Edwards
[line drawn to connect]
In some way connected—or when he came in, but advisor to Cascade+Desiere
Don't know his role

[unrelated notes]

They never told him why they hired him

Was aware of Edwards being a part of the team hired to try to resolve this matter

[unrelated notes]

Edwin Edwards—called Brown on several occasions—
—Wanted Background—re case—
—More on lawsuit—confrontation with Weems also

Decision that Judge would make—
He would have no authority+Judge would make that final decision.

[unrelated notes]

E/E 10,000.00 retainer fee to Bring this thing to an end.

Don't know what role ElE [scribble] had in bringing it to an end—
Have to ask Gonzales—He was in the center of the suit+the settlement

Don't know if he is a friend of *Edwards* [underlining in original]

- *For example*:
  - Count 51 charges:

BROWN falsely stated that he met with EDWARDS at EDWARDS' office but the conversations only related to political matters and he, BROWN, was delivering an 'innocuous' form to EDWARDS. . . .

  - The 302 states:

To a specific question, BROWN indicated that he has met with EDWIN EDWARDS before, at EDWA.R.DS' office.

He specifically indicated that on one occasion, EDWARDS asked him to bring a "form" by for EDWARDS. BROWN was going to his wife's restaurant and it was close to EDWARDS' office, so he indicated to EDWARDS he would bring the form by and visit with hum.

To a direct question, BROWN indicated that the form had nothing to do with CASCADE INSURANCE COMPANY, or any actions involving DAVID DISIERE.

His conversation with EDWARDS in the office related to political matters and what was going on in the State Government and it had nothing to do with CASCADE INSURANCE COMPANY or DAVID DISIERE.

He didn't recall what the form was but characterized it as "somewhat innocuous." (p. 8)

- The notes state:

E/E—asked for a form - was going out
To his wife's restaurant—
Leadership challenge—but nothing
to do with this matter

Form—? [sic]—"somewhat innocuous."—

- *For example*:
  - Count 54 charges:

BROWN falsely stated he had "no conversation with anyone about an amount of settlement" concerning the Cascade Insurance Company . . .

  - The 302 states:

BROWN "had no conversations with anyone about an amount of settlement" concerning the CASCADE INSURANCE COMPANY matter. (p.9)

  - The notes state:

No conversation with anyone about any
amount of settlement

- *For example*:
  - Count 55 charges:

BROWN falsely stated that he had never discussed specifics of a settlement regarding Cascade Insurance Company with Judge Sanders . . .

  - The 302 states:

BROWN never discussed with Judge SANDERS the specifics of the settlement regarding CASCADE INSURANCE COMPANY: (p.9)

- The notes state:

  Never discussed with Sanders the specifics of the settlement

Because the rough notes are identical to the 302 in the several aspects that Brown finds critical and substantially identical in all other respects, the Court DENIES Mr. Brown's Post-Trial Motion to Compel Production of Notes. Moreover, for this reason alone, even if the law has changed and it should be standard practice to provide the rough notes to the defense, the Court believes that any prejudice to Brown resulting from an absence of the notes was entirely non-existent.

Besides the fact that the rough notes and the 302 contain no discrepancies that would have aided Mr. Brown's defense, there are several other reasons to conclude that the absence of the notes was utterly harmless. First, Brown *was* able to assail Burton's *command over articles* in front of the jury with respect to Count 54:

> AGENT BURTON: He said he had no discussions with anyone about an amount of settlement.
>
> MR. JEFFRESS: About *an* amount of settlement?
>
> AGENT BURTON: Yes. That's what he said.
>
> MR. JEFFRESS: He said about *the* amount of settlement, correct?
>
> AGENT BURTON: About *an* amount of settlement.
>
> MR. JEFFRESS: Well, *that's the way you wrote it down in your 302, huh*?
>
> AGENT BURTON: I would have to look at that. Can you help me there as to where that's said for sure?

> MR. JEEFRESS: Look at page 9. You wrote down "Brown had no conversations with anyone about *an* amount of settlement concerning the Cascade Insurance Company matter," is that right?
>
> AGENT BURTON: That's right, "*an* amount."
>
> MR. JEFFR.ESS: *You are testifying you are sure as we sit here ou know three-and-a-half years later or whatever it is that he used the word "an" and not the word "the"*?
>
> AGENT BURTON: I think he said "and not *the* amount of *the* settlement" because he had already said that he had no—he had not read *the* settlement, is what he said.
>
> 9/27/00 Tr. Burton Cross p. 79 lines 3-22.

Mr. Brown's counsel made this "an" vs. "the" argument with respect to Count 54, which quotes directly from the 302 in charging that Brown stated he had "no conversation [9] with anyone about an amount of settlement." Immediately after this statement, the 302 reads, "BROWN didn't know when the settlement was made and didn't know how much the case was settled for." (P. 9).[10] Thus, Mr. Brown's counsel had a full opportunity to point out any perceived inconsistency in Agent Burton's use of "an" and "the": Brown's counsel pointed out that, in one sentence, he wrote about "*an* amount *of* settlement" and in the next sentence he wrote about "*the* settlement." In other words, *he used the 302* to suggest that Burton had been imprecise with articles.

Were this such a killer argument, however, it would seem natural to have pursued it, much more vigorously, with respect to Count 55. Of course, Mr. Brown argues that he was

---

[9] The 302 actually says "conversations.

[10] This statement also follows immediately in the notes: "Didn't know then and doesn't know now the settlement amount."

hamstrung by the lack of the notes, but, in Count 55 at least, he had all the elements at his disposal for a blistering attack on articles: the Count charges that Brown stated that he "never discussed specifics of *a* settlement . . . with Judge Sanders" but the 302 very clearly reads, "BROWN never discussed with Judge SANDERS *the* specifics of *the* settlement. . . ." (P. 9) Yet counsel never brought this arguably inconsistent use of articles to the jury's attention. *See* 9/27/00 Tr. Burton Cross pp. 81-82 (cross-examination by Mr. Jeffress with respect to Count 55, no articles discussed). Putting aside the fact that the notes actually support Burton's 302 with respect to these two counts [11] the Court is baffled by Brown's repeated complaints that the Government or the Court impaired his representation, when *his counsel* failed to use that which he had available to him during cross-examination).[12] *But see* Reply Mem. p.10 & 13 (Because, "as we carefully explained in our opening

---

[11] Actually, under Brown's article theory, the notes are *more* incriminating than the 302 or the indictment with respect to Count 54, since they say that Brown denied conversations about "*any*" amount of settlement.

[12] Brown's counsel also neglected to point out Burton's use of "a" and "the" in the following section of the 302:

> . . . BROWN was aware a settlement was reached between the LRO with DESIERE [sic] and approved by the Court.
>
> BROWN however had no knowledge of the terms of *a* settlement that was reached with DAVID DISIERE in the 19th Judicial District Court concerning CASCADE INSURANCE COMPANY.
>
> BROWN has never read *the* settlement and knew nothing specific of the terms of *the* settlement.
>
> Again, he emphasized that he was "out of the loop" concerning the operations of the LRO and would have had no reason to be aware of *the* settlement issues . . .

Burton 302 interview of Jim Brown pp. 3-4 (emphasis added). Giving counsel the benefit of the doubt, he probably did not highlight this section because it demonstrates that "a" and "the" are sometimes different only by the number of letters in each word.

memorandum, the truth or falsity of what was said in the interview turns on exactly what words were used"—"[f]or example, . . . did [Brown] deny discussing the 'specifics of a settlement . . . with Judge Sanders,' or simply deny discussing '*the* settlement' (Count 55)"—"Mr. Brown's closing argument would have been far more effective *with* the notes than without them.") (parenthetical and emphasis in original). Even had counsel pursued this line of examination as *fully as he could* have, the Court sincerely doubts whether the jury ever would have accepted the articles argument.

In addition to casting doubt on Agent Burton's mastery of articles, Mr. Brown's counsel had unfettered success attacking Burton's credibility on several other occasions, which he could have used to support the article defense. For example, in front of the jury, he was able to disparage Agent Burton's ability to *write things down correctly* in his notes or to *copy things correctly* from his notes to his 302. Witness the extensive discussion of Burton's misnomering (and misgendering) of Errue Branch:

> MR. JEFFRESS: . . . Did Mr. Brown tell you that Ernie Branch of his department had been brought in to look at the Elaine Chandler report after it was issued?
>
> AGENT BURTON: I have in my notes "Eunice" and I thought that's what he said. It may be Ernie Branch and I think maybe at this particular time—but I had "Eunice" in my notes and that's what I thought I heard him say. Yes, he indicated Mr. Branch had been brought in to review and he wasn't sure if it was the Chandler report, but he believed it was the Chandler report, yes. * * *
>
> MR. JEFFRESS: The truth of the matter is that, again, according to what you believed he said, that Eunice—E-U-N-I-C-E—Branch, an employee of the Insurance Department, indicates that he thought the Chandler report was slanted or biased against Disiere, correct?

AGENT BURTON: That's what he said, yes.

MR. JEFFRESS: It wasn't Eunice Branch? You know who Ernie Branch is?

AGENT BURTON: No, I have never met him. * * *

MR. JEFFRESS: But it's your recollection Mr. Brown referred to Ernie Branch as "Eunice"?

AGENT BURTON: He may have said "Ernie." I may have misread that word in my notes. but I got a Branch, "Eunice" or "Ernie," real close, and I read it as "Eunice."

9/27/00 Tr. Burton Cross. Pp. 38-40.

And Mr. Brown, again in front of the jury, had great success drawing out Agent Burton's past *misuse of important words*, when composing his 302s. Witness the testimony regarding Burton's "interview" of Foxy Sanders:

MR. JEFFRESS: When you went to interview Foxy Sanders in Mobile, Alabama, in October, you played him the tapes before he ever said a word, correct?

AGENT BURTON: That's true, yes, sir. May I?

MR. JEFFRES S: Yes. Go ahead.

AGENT BURTON: . . . the meeting in Mobile, Alabama, was not an interview and was not intended to be an interview. . . .

MR. JEFFRESS: So Mr. Sanders was not interviewed?

AGENT BURTON: Mr. Sanders was not interviewed that day. . . . * * *

MR. JEFFRESS: Read to the jury the first sentence of that memo.

AGENT BURTON: "Alfred Foster Sanders, also known as A. Foster Sanders and Foxy Sanders, was interviewed

> . . . in the offices of the Federal Bureau of Investigation, Mobile, Alabama, and later in the offices of the FBI, New Orleans, Louisiana, by Special Agent J. Harry Burton, who made known to Sanders his identity and further advised hum of the nature of the interview."
>
> MR. JEFFRESS: "Nature of the interview"?
>
> AGENT BURTON: Yes, sir. May I explain?
>
> MR. JEFFRESS: I'm going to ask you to. Why would you write down something that's untrue in an FBI 302?
>
> AGENT BURTON: It's a bad choice of words . . .
>
> 9/27/00 Tr. Burton Cross pp. 9-11.

Moreover, as discussed in great detail in a later section of this order, Mr. Brown's counsel thoroughly assaulted Mr. Burton's *ability to remember things* by forcing him repeatedly, audibly, and in the full presence of the jury to turn to the 302 to refresh his recollection at least nine times because he couldn't "rely totally on my memory, no, sir." 9/27/00 Tr. Burton Cross p. 2 line 22.[13]

After casting doubt on Burton's command of articles and his ability to copy things down correctly, after demonstrating Burton's past misuse of key words, and after drilling home the fact that Burton had several gaps in his memory, Brown's attorney again trumpeted the article defense in his summation. *See* Tr. Brown Closing, *infra*, note 18 (reminding jury of Burton's testimonial deficiencies and insisting that "[y]ou would expect more proof than an agent who can't remember what really was said and *has to read to you from* the indictment when he's asked what was said . . . in a case

---

[13] This point requires an entire section because Mr. Brown now asserts belatedly and, given the facts, unusually, that he was unable to "show the jury how little information [Burton] recalled wthout the assistance of his 302." New Trial Mem. p. 29.

where these false statement counts depend on such twisting of words of fine distinctions about whether it's 'a settlement' or 'the settlement' an [sic] settlement issues versus settlement negotiations and things like that . . . .").

Yet, despite all of Brown's success in casting aspersions on Burton's credibility, the jury rejected the article defense, probably because of what Mr. Brown fails to address in his motion: his own testimony and demeanor, which the jury chose to reject.

In front of the jury, after being referred to the transcript of a tape recording of himself and Edwin Edwards discussing a "compromise" (Govt. Ex. G-503 p. 7) or "agreement" (*id.* p. 5) whereby Disiere would collect re-insurance claims and "guarantee" (*id.* p. 4 and 5) the collection of $2 million in return for Sanders agreeing to call off his "witch hunt" (*id.* pp. 3 & 7), Mr. Brown adamantly asserted that this conversation had "nothing to do with the settlement." 10/3/00 Tr. Brown Cross p. 135 line 17. After giving Brown the opportunity to read more of the transcript, the prosecutor then asked Mr. Brown whether he was "still insisting you are not talking about any settlement at this point, sir?" *Id.* p. 136 lines 5.6. Mr. Brown then stated: 'Tm not saying in the earlier conversation that I'm going to—I think your question was [sic] I going to tell Michael Adams to sign off on the deal, and my answer is no." *Id.* lines 7-9.

This exchange, though memorialized in a cold transcript, should evoke a palpable, obvious, and painful discomfort that, together with the tapes, suggests why the jury convicted Mr. Brown on all counts alleging that he expressly disclaimed conversations or discussions concerning "a" or "the" or "any" settlement or settlement issues (Counts 48, 50, 54 and 55), and makes it entirely too speculative to believe that the jury would have come down in Mr. Brown's favor had defense counsel been allowed to ask a few more questions about "what the meaning of 'is' is."

Indeed, it is quite possible, perhaps undeniably probable, that Brown's "twisting of words of fine distinctions" (Tr. Brown Closing) backfired. In a society tired of what it perceives as meaningless verbal hairsplitting and empty legalism, it is entirely plausible that the jury was convinced that Brown was attempting to "twist[]" "fine" but *irrelevant* "distinctions" to throw the FBI off his trail.

Perhaps a comparison will illustrate the point. Defendant Ron Weems provided so much information when interviewed by Agent Burton—and was apparently so forthcoming that he called Agent Burton after the interview to offer a technical clarification of a statement he had made during the interview--that his alleged omission (failing to tell Burton that Edwards had once remarked that he had to share his Cascade fee) seemed irrelevant by comparison and, thus, unintentional. The jury rejected the Government's theory that Weems intentionally told Agent Burton some things so that he would not investigate other things. Weems was acquitted of lying to Agent Burton.

In contrast, as just noted, the jury observed Jim Brown on the stand insist that his October 2 discussion of "*a* compromise" (whereby "this thing" would "be resolved") had "nothing to do with *the* settlement," and, when given a chance, refuse to take back his statement that he had "not [been] talking about *any* settlement," insisting instead that the prosecutor had just asked the question wrong. This testimony was powerful and struck at the very heart of Brown's article defense. The jury could well have concluded that Brown, unlike Weems, tried to exploit technicalities so that Burton would not pursue his investigation. Brown was convicted on four counts of disclaiming discussions regarding settlement issues.

In some other respects, however, the cold transcript by itself may not convey the dramatic impact of first hearing Mr. Brown's tape recorded conversation, then observing him

provide a potentially incongruous or potentially exculpating explanation of his own recorded words on the stand.[14] That it *was* dramatic is perhaps best illustrated by Brown's conviction on Count 51, which charged that Brown

> falsely stated that he met with EDWARDS at EDWARDS' office but the conversations only related to political matters and he, BROWN, was delivering an 'innocuous' form to EDWARDS when in truth and in fact BROWN well *knew that* he met with EDWARDS at EDWARDS' office to *discuss more* than political matters. In fact, BROWN specifically discussed strategical issues involving David Disiere and the Cascade Estate.

Importantly, Mr. Brown never challenged the accuracy of Agent Burton's 302 or testimony with respect to this count. Quite the opposite, Mr. Brown implicitly vouched for the accuracy of the words Burton recorded in his 302 [15] and defended them at trial, insisting on direct examination

- that Cascade was "[n]ot at all" on his mind when he went to see Edwards (1013100 Tr. Brown Direct p. 46 lines 21-22);
- that "Cascade was not of any.concern" to him (*id.* p. 47 line 12);
- that he "didn't care about" Cascade (*id.* p. 47 lines 12-13); and

---

[14] This is especially true with the rough transcript currently in the Court's possession, *which, rather* than containing a transcription of any tape recorded conversation, merely states 'WHEREUPON, the CD was played."

[15] Mr Brown never denied that he had told Agent Burton that he met with Edwards at Edwards' office and that "the conversations only related to political matters." Count 51. To the contrary, he implicitly vouched for the accuracy of Burton's 302, testifying that "until I heard these tapes after I was indicted, I would have sworn that, when I went to Governor Edwards's office that day, the only thing we discussed was the U.S. Senate race." 10/3/00 Tr. Brown Direct p. 48 lines 15-18.

- that Cascade "wasn't even on the flip; it wasn't even on the radar" (*id.* p. 48 line 1).

The jury, however, had heard this particular conversation earlier during the trial, and had its memory refreshed when Brown's counsel played an excerpt from the recording immediately before asking his client to explain his version of why the statement he admitted making was not a lie. Although the jury *could* have believed Mr. Brown's live explanation that he truly believed "that, when I went to Governor Edwards's office that day, the only thing we discussed was the U.S. Senate race," (1013100 Tr. Brown Direct p. 48 lines 16-18), it certainly appears that the jury *did not* accept that Mr. Brown "didn't care about" Cascade "at all" after hearing him on tape

- "bring [Edwards] up to date" on his meeting with Sanders, who had told him that he intended to "bring this thing to an end" and discussed the manner in which he could "settle" the Cascade matter;
- state that he had reported his conversation with Sanders to Ronald Weems;
- state that Ronald Weems had reported to him that Sanders had discussed with Weems the settlement of the Cascade matter for "two million dollars up front, two million dollar note three to four years down the line";
- state that. while in Atlanta for an insurance commissioners' dinner, he had discussed Bonneville with the Oregon Insurance Commissioner,
- discuss Disiere's potential "fourteen million dollar tax credit" for Bonneville;
- discuss the role of Edward Gonzalez in the settlement, including his fee and the possible political wounds Gonzalez could inflict on Brown; and

- discuss the RICO suit, which was based on how David Disiere ran Cascade Insurance Company.

Excerpts from Govt. Ex. G-555 pp. 2-12 and 21-23. A reasonable jury could have concluded that these were not the words of a man who "didn't care about" Cascade "at all."

Mr. Brown's argument that the tape recording of this conversation demonstrated that Cascade was not on his mind when he went to see Edwards that day could well have done similar damage to his credibility in the eyes of a reasonable juror. At trial, Brown told the jury that his purpose for seeing Edwards that day—the reason he "wanted to come' by" (10/3/00 Tr. Brown Direct p. 46 line 6 (quoting transcript of Govt. Ex. G-555 p. 2))—was to "[t]alk to him about the possibility of my being appointed to the United States Senate." *Id.* lines 8-9. Thus, when "Governor Edwards interrupted [Brown] and said, 'Stuff hit the fan'" (*id.* lines 18-19 (politely quoting the transcript of Govt. Ex. G-555 p. 2)), Brown did not "immediately know what he was ta[illegible]ng about," and so said to Edwards, "I don't know what [you are] talking about." *Id.* lines 19-20 *not* quoting the transcript of Govt. Ex. G-555 p. 2). Thus, Brown argued, the fact that *Edwards* brought up Cascade and the fact that he did not know what Edwards was talking about proved that Cascade was "[n]ot at all" on his mind when he went to see Edwards, and supported his theory that he innocently forgot to tell Agent Burton that he and Edwards had discussed Cascade that day.

That was Mr. Brown's explanation; here is how the jury heard this conversation:

> JHB [Jim H. Brown]: Right. Yeah. I wanted to come and . . .
>
> EWE [Edwin W. Edwardsl: Shit hit the fan, huh?
>
> JHB : On what?

EWE: On that thing.

JHB: Well, at, let me see, let me bring you up to date . . . [whereafter Brown gives a long, detailed description of his Cascade-related activities, discussed above]

Govt. Ex. G-555 p. 2.

Several points could be made about how this, passage does not square with Brown's explanation, but the Court will focus on just two. First, although Brown is correct that Edwards initiated the Cascade discussion, Edwards (like Agent Burton several months later) clearly believed that Brown had come to his office that day to discuss Cascade. Edward's belief is reinforced mere seconds later when Brown "brings [him] up to date" about his Cascade related activities, as if Edwards had been expecting a report. Second, despite his in-court protestations that he didn't "know what [Edwards] was talking about," the on-tape Brown quickly recognized that Edwards' cryptic reference to "that thing" meant "Cascade." In fact, it was so clear to the on-tape Brown what that "thing" was that he immediately launched into his long soliloquy regarding Sanders and the Cascade settlement without seeking further clarification. Had he really gone to Edwards' office to discuss only political matters, it would seem that the trouble (of which Edwards so colorfully spoke) could have referred to any number of events in Baton Rouge or Washington.

In light of the tapes and Brown's testimony, *and* especially since the jury's determination of the validity of Count 51 did not turn on any "swearing contest between Agent Burton and Mr. Brown," (New Trial Mem. p. 22),[16] it would certainly be improper to invade the jury's role in "judg[ing] the credibility and evaluating] the demeanor of [Mr. Brown] and . . . deciding] how much weight should be given [his] testimony."

---

[16] The notes, like Mr. Brown's testimony, do not contradict the 302.

Millsaps, 157 F.3d at 994. And, of course, Mr. Brown's additional, implausible denial of a conversation concerning settlement issues certainly could have reinforced the jury's opinion as to the validity of Counts 48, 50, 54 and 55.

The larger point to be made is that, in light of

- the damage Mr. Brown's counsel inflicted on Burton's credibility without the notes;
- his counsel's ability (whether exercised or not) to pursue his article defense without the notes; and
- the fact that the jury clearly was able to distinguish between the lies it believed occurred and the lies it believed did not occur without the notes—a process which included several determinations wholly independent of Burton's credibility and several in which they rejected Burton's credibility,

it would be rank and utter speculation for this Court to conclude that the possession of Agent Burton's handwritten notes could have aided Mr. Brown's defense. Indeed, the Court need not speculate: because the notes are substantially identical to the 302, they could not have aided his defense at all.

In short, the Court finds no prejudice in its decision not to force disclosure of the rough notes, which it felt it did not have the right to do.

B. *Impermissible Limitation on Cross-Examination.*

Mr. Brown objects for the first time that the Court improperly precluded his counsel from having "'Mr. Burton answer questions about the interview *without* consulting his 302, and before he had refreshed his memory of it, to show the jury how little information he recalled without the assistance of his 302." New Trial Mem. p. 29 (emphasis in original). Despite his current contention, a simple review of

the transcript shows that Mr. Brown's counsel failed to object to this use of the 302 at any time during trial. Quite to the contrary, the record shows that Mr. Brown's counsel himself *initiated*, the use of the 302 in what he now deems an "objectionable" manner.

Early in his cross-examination of Agent Burton (and prior to what he now asserts was an "objection"), Mr. Brown's counsel made certain that Agent Burton had the 302 in front of him so that he could ask him to testify directly from it. The following colloquy preceded the alleged "objection" by mere minutes:

> MR. JEFFRESS [to Agent Burton]: Do you have the 302 in front of you?
>
> AGENT BURTON: Yes, sir.
>
> MR. JEFFRESS: *Let's go to it.*
>
> 9/27/00 Tr. Burton Cross p. 26 lines 21-24.

Mr. Brown's counsel then expressly asked Agent Burton to compare his testimony with the words written in the 302.

Just moments later, but still moments before the alleged "objection," Mr. Brown's counsel, without another word and certainly without objecting, voluntarily "referr[ed]" Agent Burton to the 302 in order to "help" him testify:

> MR. JEFFRESS: Jim Brown told you that he had talked to an Oregon Insurance Commissioner about Cascade?
>
> AGENT BURTON: Where are you referring to? Help me with it.
>
> MR. JEFFRESS : Page 2.
>
> 9/27/00 Tr. Burton Cross p. 29 lines 9-12.

In other words, ***Brown's counsel himself used the 302 to refresh Burton's recollection.***

Just a short moment later, a prosecutor objected to what he described as defense counsel's practice of going "line by line over the 302" and offered to admit the 302 into evidence. 9/27/00 Tr. Burton Cross p. 30 lines 14-16. *Asked for his response to the Government's offer to admit the 302 into evidence*, Mr. Brown's counsel stated that "I would object to it to admit it for the truth of the matter asserted. It's being used for *refreshed recollection* and impeachment." *Id.* p. 31 lines 5-7. It is important to note the context here: Mr. Jeffress was objecting to the admission of the 302 into evidence. There was *never* a motion to remove the 302 from Agent Burton's possession before he would be allowed to continue testifying.

A short time later (after allegedly "objecting" to Agent Burton's use of the 302), Mr. Brown's counsel went right back to his practice of "helping" Agent Burton testify by using the 302 to refresh his recollection, without asking that it be removed. For example:

> MR. JEFFRESS: That's the statement [Jim Brown] made?
>
> AGENT BURTON: Where is that?
>
> MR. JEFFRESS: Well, you said it was, correct?
>
> AGENT BURTON: Let me make sure I say it correct.
>
> MR. JEFFRESS: I'll find it. Page 4. Okay. Do you see it? . . ."
>
> 9/27/00 Tr. Burton Cross pp. 46-47 lines 22-25,1.

Thus, in light of his own prior practice of using the 302 to refresh Agent Burton's recollection and his contemporaneous statement that the 302 was "being used for refreshed recollection," and in light of the fact that the Government was offering the 302 into evidence, defense counsel's statement that "I would like him to testify from his memory. He apparently doesn't have—" failed to apprise the Court that he

was objecting to Agent Burton's use of the 302 to refresh his recollection. *See United States v. Polasek*,162 F.3d 878, 883 (5th Cir.1998) ("A loosely formulated and imprecise objection will not preserve error. Rather, a trial court judge must be fully apprised of the grounds of an objection.") (citations omitted); *United States v. Maldonado*, 42 F.3d 906, 912 (5th Cir.1995) (objection must be specific enough to allow the trial court to take testimony, receive argument, or otherwise explore the issue raised). Indeed, in light of his substantially contemporaneous—and non-inflammatory—hearsay objection, it is clear that the Court, in interrupting counsel's statement, did nothing more than prevent Brown's counsel from making an improper comment in open court about a witness's credibility while that witness was still testifying. Mr. Brown's *counsel* commented on Agent Burton's credibility at length during closing argument without impediment from the Court. Closing argument, unlike cross-examination, is an appropriate time for an attorney to comment on a witness's credibility. Thus, "[i]t's being used for refreshed recollection and impeachment," though phrased in the passive voice, especially in the context, certainly did not—and simply does not—sound like Mr. Brown's counsel was objecting to using the 302 to refresh recollection.

Even assuming that defense counsel made the objection, the Court finds no error or harm in allowing Agent Burton to use the 302 to refresh his recollection. First, although Brown correctly argues that Federal Rule of Evidence 613(a) does *not require* that a prior inconsistent statement be presented to a witness before it is used to impeach, Brown does not argue that such a practice is prohibited.

More important, Brown's suggestion that the Court prevented his counsel from demonstrating Agent Burton's "reliance on the 302" is *simply untenable*. New Trial Mem. p. 31. At the very outset of his cross-examination, Brown's attorney unimpededly induced Agent Burton to admit that he

had to "rely on" the 302 because he couldn't "rely totally on my memory, no, sir." 9/27/00 Tr. Burton Cross p. 2 lines 21-22.[17] Then, no fewer than eight times throughout the cross-examination, Brown's attorney—again without impediment—induced Agent Burton to admit that he had to refer to his 302 in order to testify. *See, e.g.*, 9/27/00 Tr. Burton Cross p. 29 line 11("Where are you referring to [in the 302]? Help me with it."); p. 30 lines 11 & 13 ("I have to go back to this [302] now . . . . to refresh my memory."); p. 31 lines 20-25 ("Let me read this [302], please . . . . I am not going to sit up were [sic] here and indicate I have memorized this 302. That would be wrong. I have referred to it because that's the best record of my memory . . . . "); p. 39 lines 12-18 ("I have to rely on this 302 . . . ."); p. 46 line 23 ("Where is that [in the 302]?"); p. 52 lines 20-22 ("I would have to go to . . . . the 302 . . . ."); p. 79 line 10 ("I would have to look at that [302]."); p. 84 lines 21-22 ("Let me go back to it [the 302] to be specific . . . ."). His unimpeded success in inflicting these wounds to Mr. Burton's credibility certainly was not lost on Mr. Brown's counsel,[18] on his brief writer,[19] or even in the cold transcript,

---

[17] In fact, just prior to this statement, Brown's counsel was able to induce Agent Burton to offer the rather remarkable testimony that, while on direct, he was reading from the indictment "to make sure that I spoke correctly as to what the statement was as set forth on the 302. . . "9/27/00 Burton Cross p. 2 lines 4.7.

[18] In closing argument, Mr. Brown's counsel made sure to remind the jury of Agent Burton's memory lapses:

> Ladies and gentlemen, when Harry Burton testified *he* wasn't *really recalling—you remember. I would ask him*, "What did Jim Brown say?" and he would look down at the desk and he would look back up at you and tell you what Jim Brown said according to Agent Burton. I sort of thought—I didn't know what he was looking at, but I asked him when I got back up. Do you know what I was doing? He was being asked the question of what Jim Brown said, and he was looking at the indictment. He was reading to you from the indictment. *He wasn't testifying from memory. Look. I don't expect him to testify from memory.* This is an interview three and a half

and it would be unreasonable to believe it was lost on the jury. Thus, the Court can conclude with great confidence that, even if it erred in failing to detect defense counsel's stealth objection, it did so without the slightest prejudice to Mr. Brown's ability to "show the jury how little information [Burton] recalled without the assistance of his 302." New Trial Mem. p. 29.[20]

C. *Curative Instructions.*

The Court also fails to discern any prejudice from several of its instructions to the jury.

---

years ago. *I can't blame him for not doing that, because he has no memory today of exactly what was said.* So what does he do? He says, "Well, you know, I made a 302." You remember that a 302 is a memo. But, you know, in a case where these false statement counts depend on such twisting of words of fine distinctions about whether it's "a settlement" or "the settlement" an [sic] settlement issues versus settlement negotiations and things like that, ladies and gentlemen, you would expect more of that. You would expect more proof than *an agent went who can't remember what really was said and has to read to you* from the indictment when he's asked what was said.

[19] Mr. Brown's brief writer, though, would have it both ways. At this point in his argument, he complains that the jury did not hear *enough* about Agent Burton's reliance on the 302, while, at another point, he complains that they heard *entirely too much* about his reliance on the 302. *Compare* New Trial Mem. p. 29 (counsel was unable to "show the jury how little information [Burton] recalled without the assistance of his 302") *with id* p. 23 (jury unhealthily fixated on the 302 "because Agent Burton *repeatedly* testified it was the 'best record' of [my memory of] what Mr. Brown said during the interview 3 1/2 years earlier.") (emphasis added). *See, e.g.*, 9/27/00 Tr. Burton Cross p. 31 lines 24-25 ("I have referred to [the 302] because that's the best record of my memory").

[20] If the jury did not hold Agent Burton's lack of memory against him, perhaps Mr. Brown's trial counsel is to blame: "Look, *I don't expect him to testify from memory . . . . I can't, blame him for not doing that*, because he has no memory today of exactly what was said." Tr. Brown Closing Argument.

In light of the Court's pre-trial decision not to compel disclosure of Agent Burton's handwritten notes, explained above, Brown's counsel informed the Court at a bench conference during his cross-examination of Buxton that he thought "the jury ought to understand I don't have the notes and can't show them to [Agent Burton]." 9/27/00 Tr. Burton Cross p.17 lines 24-25. Counsel informed the Court that "I want you to tell the jury that 'Mr. Jeffress does not have the notes. I have ruled he is not entitled to the notes.'" *Id.* p.19 lines 3-4.

Following the bench conference, the Court instructed the jury that an FBI agent's "handwritten notes . . . . are [not] something that needs to go to the defense lawyers . . . . because what they get is the finished product, the typed product . . . . The notes were never made available to defense counsel, so he cannot present them to you or use them to cross-examine this witness with." 9/27/00 Tr. Burton Cross p. 20 lines 16-25. These statements are faithful to, if not exactly the same as, the words requested by Brown's counsel. *See United States v. Mann*, 16 I F.3d 840, 865 (5th Cir. 1998) ("Unless the defendant has demonstrated that the court's charge as submitted is erroneous, his contention that he was entitled to the particular language in his proffered instructions is meritless."), *cert. denied, 526* U.S. 1117, 119 S. Ct. 1766, 143 L. Ed. 2d 796 (1999).

As noted above, Brown's counsel also asked the Court to instruct the jury that the Court had "ruled" he is not entitled to the notes. As discussed earlier in this order, the Court "ruled" that counsel was not entitled to the notes after it followed "a procedure" whereby it was "asked to determine whether the typed, finished product is accurate based on the handwritten notes . . . . 9/27/00 Tr. Burton Cross p. 20 lines 21-22.[21] The

---

[21] This "procedure" that the Court followed should not be confused with the "procedure" Agent Burton testified he followed in preparing his 302. *See* 9/26/00 Tr. Burton Direct pp. 16-18 (describing in great detail

the procedure by which he takes notes, dictates a report, edits and checks for error, and sometimes has another agent review the 302 before it is completed). Mr. Brown's brief writer certainly seemed to be confused (at best) when he blurred the distinction between the two. Compare the Court's actual statement at page 62 of Burton's cross:

> . . . . Stick to *the 302*. Do you want me to explain again for the jury the *procedure for preparing the form*—[interrupted by defense counsel]

to the brief writer's inaccurate representation of the statement:

> . . . . Mr. Brown's efforts to explore the subject matter [of the notes] further were deterred by the Court's statement that it would "explain again for the jury the procedure" (9/27/00 Tr. 62), *meaning* once again to inform the jury of "*procedure* [that] was followed before this trial"(*id* at 20) *in which the Court had examined the notes and found them to support the 302*. Reply Mem. P.16 (sic, parentheticals and misrepresentation in original, emphasis added).

Facially, the Court's statement does not refer to Mr. Brown's pre-trial motion. Facially, the Court's statement refers to how Agent Burton prepared the form 302. Lest their be any confusion that this was an innocent misstatement—rather than a near fabrication—of the record, the Court refers the brief writer to pages 17-19 of Burton's cross:

> MR. MANN: He wants to cross-examine him on the notes . . . . . He gets [the 302] to cross-examine the witness with. That's it.
>
> MR. JEFFRESS: Even though you elicited from him the notes and called it "recording," I don't get them. That's all, Your Honor. Your Honor has ruled.
>
> THE COURT: That's the *procedure* for *how you create the document*. It's naive to think somebody is going to sit there and type it out while they are talking to someone. If you want to ask him what is the *procedure, he* [Mr. Burton] can explain it again. I think it's already explained, but perhaps I'm wrong.
>
> MR. JEFFRESS: I think the jury ought to understand I don't have the notes and can't show them tohim . . . . * * *
>
> THE COURT: Ask the witness if he *reviewed the notes and reviewed the 302* and did the 302 contain the information in the notes . . . . * * *
>
> MR. JEFFRESS . . . . But, Your Honor, I just want to bring out because I think it's unfair that the jury is led to believe—

Court included this explanation of its ruling in its instruction to the jury. At the next break, Brown's counsel objected to the instruction on two grounds and moved for a mistrial.

Even though he had requested an instruction that he did not have the notes because the Court had ruled "he is not entitled to the notes," Mr. Brown's counsel objected that the Court "in essence, instructed the jury that the defense lawyers aren't entitled to and don't get those notes." *Compare* 9/27/00 Tr. Burton Cross p.19 lines 3-4 *with id.* p. 33 lines 2-4. Apparently, counsel wanted the Court to instruct the jury that he, in particular, did not have the notes because the Government had inadvertently provided the notes of the Weems 302 to Mr. Castaing. The Court, however, did not learn about this inadvertent disclosure until after it had instructed the jury. *See* 9/27/00 Tr. Burton Cross p. 33 line 13 ("You gave Weems the handwritten—[?]"). Nonetheless, the Court sees no prejudice in this subtle difference in its instruction, especially since the last sentence of its original instruction obviously applied to Mr. Jeffress in particular. *See id.* p. 20 ("The notes were never made available to defense counsel, so he [*i.e.*, Mr. Jeffress] cannot present them to you or use them to cross-examine this witness with.").

> THE COURT: That's the law, Mr. Jeffress.
>
> MR. JEFFRESS: I understand that. I'm not saying that. I just want to tell them that I don't have the notes, and you can do it or I can do it.
>
> THE COURT: I can tell them you are not entitled to the notes under the law . . . . Is that what you want me to tell them? Because I don't want that to be an issue on appeal. I know the issue is on appeal as to whether you get the notes, but I don't want to create an issue.

9/27/00 Tr. Burton Cross pp. 17-19. Of course, an accurate characterization of the Court's statement is inconvenient because it does not support the claim that Mr. Brown's defense was *ever* "Undermined," let alone "Again and Again." Reply Mem. p. 11.

Brown's counsel also stated that he felt that the Court "had instructed the jury, in essence, that [it] had reviewed those notes and determined that they were consistent with or accurately reflected what's in the 302." 9/27/00 Tr. Burton Cross p. 32 lines 18-21. Because the Court felt that it had simply complied with defense counsel's request to inform the jury about its ruling, and because it discerned no prejudice in its instruction, the Court denied the motion for a mistrial but offered to give a curative instruction. Brown's counsel suggested "a curative instruction that you didn't mean to say that you had made any determination that the notes . . . . " *Id.* p. 35 lines 21-23. Although he neither contemporaneously objected to the resulting curative instruction nor offered an alternative instruction then or at any of the subsequent charge conferences, Brown's counsel now objects that the Court's curative instruction was horribly prejudicial.

First, Brown objects that the Court failed to instruct the jury that it had not made any determination that the 302 accurately sets forth the notes' contents. The record does not support this contention. Following Brown's counsel's suggestion that the Court tell the jury "you didn't mean to say that you had made any determination that the notes . . . .," the Court instructed the jury that "I did not intend to tell you that [the 302] was accurate because that is not within my province," and that "my determination of anything is totally irrelevant . . . ." *Compare* 9/27/00 Tr. Burton Cross p. 35 lines 21-23 *with id.* p. 36 lines 12-14. Although these are not the exact words used by defense counsel, they do deliver the same message. *See Mann*,161 F.3d at 865.

Second, Brown objects to the Court's purported failure to instruct the jurors that they "*must* disregard her [sic] comment because it was *improper* for them to consider its determination that the 302 was 'accurate based on the handwritten notes." New Trial Mem. p. 23 (emphasis in original). Of course, this argument simply overlooks the plain import of the Court's instruction that "*any comment I make on the*

evidence is not evidence and it *is not to be weighed* in your credibility findings" since "*You are to determine whether a witness is credible, whether evidence is to be given any weight*, or considered by you because you are the fact finders." 9/27/00 Tr. Burton Cross p. 36 lines 6-10 (emphasis added). It also ignores the plain meaning of the Court's instruction that determining the accuracy of the 302 "*is not within my province*" because all determinations of credibility are "*entirely within your province.*" *Id.* lines 14 and 19 (emphasis added). The Court concedes its civility in closing the instruction with a call for the jury to "*please* ignore" its earlier comments regarding the accuracy of the 302 (*id.* line 20), but at that point, following several strong admonitions, any error resulting from politeness was academic.[22]

Assuming, however, that defense counsel's objection to the Court's use of a plaintive word was not mere nit-picking, the Court questions whether *United States v. Iribe•Perez*, 129 F.3d 1167 (10th Cir, 1997), actually supports his assertion that "simple instructions to 'disregard' comments made by judges are less likely to be effective." New Trial Mem. p. 23. In *Iribe-Perez*, the Court stated, "Although we generally presume that curative instructions are followed, we are not convinced that it was possible to eliminate the 'taint' on this jury", since "*the members of the actual jury were told by the presiding judge that the defendant was pleading guilty to the very crime that they were impanelled to decide.* In essence, the jury had been told that the defendant was going to admit all the material facts alleged in the indictment." *Id.* at 1171 (internal citation omitted, emphasis added). As proof of prejudice in *Iribe-Perez*, one venireperson actually

---

[22] Although the "please ignore" comment was the Court's last on that topic, through juxtaposition and omission, the brief writer implies that it was the first, and only, admonition used. *See* New Trial Mem. p. 23 (complaining that the Court "only asked the jury to 'please ignore' the Court's determination . . .").

"expressed doubt about whether he could act neutrally, stating that he couldn't 'help but think about the plea bargain. . . .'" *Id.*

Here, however, counsel offers the rather convoluted theory that because the Court told the jury that the handwritten notes were "accurately recorded" in the 302 and that the 302 was "identical to Mr. Burton's testimony," it, therefore, told the jury that the notes were "identical to his trial testimony" and thereby robbed the jury of independent thinking and rational thought to such an extent that they were unable to consider the very possibility that there was "room for error in [Burton's] testimony," even when given a "simple" instruction not to weigh any of the Court's comments—including any comment regarding accuracy—in assessing Burton's credibility, and even though that very same jury acquitted his client on almost half of the false statement counts, rejecting much of Burton's testimony and 302 in the process. New Trial Mem. p. 21.

In addition, note one (of many) rather obvious gaps in logic here: nowhere is the Court accused of telling the jury that the handwritten notes themselves were accurate or that Burton "accurately recorded" Brown's statements in his handwritten notes. Even assuming the jury was unable to distinguish between notes, 302, and testimony, the jury certainly seemed to recognize that the Court had not forced it to accept the validity of the notes/302/testimony, since, for example, it wholly rejected Mr. Burton's version of the interview as recorded in his 302 and testified to at trial with respect to Count 56. The Court therefore concludes that "simple" instructions can be quite effective when delivered properly.[23]

---

[23] Brown's insistence that the Government's use of the word "recorded" had a similar distorting effect is similarly absurd. Brown suggests that the use of the word "recorded" led the jury to believe that Agent Burton had transcribed Mr. Brown's words *verbatim*. Brown's counsel expressed this rather hyperbolic theory at sidebar: "the jury is

being led to believe that those notes record the interview *actually*" 9/27/00 Tr. Burton Cross p.16 lines 24-25

The Court understands that the word "record" is central to Mr. Brown's theory as to why he was entitled to the notes under Rule 16(a)(1)(A), but that is an appellate argument. With all due respect to counsel, there is absolutely no way the *jury* would or could have believed that Agent Burton had written down everything Brown said verbatim merely because the Government used the word "recorded." Regular people know that when they take notes, they rarely write down every (or even most) word spoken and that they often make mistakes. Indeed, *these jurors* although taking notes throughout Mr. Brown's testimony, asked for a transcript of Mr. Brown's testimony: they wanted a verbatim "record" of his words because they felt they could not rely on their own notes. *See* 10/10/00 Jury Note. Lest they think Agent Burton used some other, superhuman method of taking notes, Agent Burton explained that he, too, merely "take[s] notes . . . . [d]uring the course of the interview" (9/26/00 Tr. Burton Direct p.16 lines 18-19), and even revealed that the resulting 302s might contain errors, as evidenced by the fact that he or another agent might have to correct them. *See id.* p.17 (lead agent can "make and correct editing that don't jive with your memory, other notes or typos, things of that nature") and p.18 ("The other agent will also review and examine that 302" to make sure "that person agrees this is what transpired during the course of the interview, this is the statement . . . . of the person that was interviewed . . . ."). As a concrete example of error, he admitted spelling "Ernie" wrong. *But see* Reply Mem. p. 9 (complaining that neither Agent Burton nor the Court described the notes as imperfect). At least twice, the Court suggested to Mr. Brown's counsel that he ask Agent Burton again about the procedure by which Agent Burton took "notes" were he concerned that the jury didn't understand. *See* 9/27/00 Tr. Burton Cross pp. 16-18 & 62.

The Court tried to explain to defense counsel during the sidebar that he was mistaking a legal argument for an argument that would actually matter to the jury, but to no avail. *See* 9/27/00 Tr. Burton Cross pp. 16-18. Throughout the trial, instead of appealing to common sense and common experience—in other words, instead of trying to appeal to the jury—counsel appealed to the Fifth Circuit, persisting, for example, in his less-than-compelling argument that his client's "a" vs. "the" defense was fatally impaired by not having the notes.

The Government's use of the word "recorded" confused no one except the defense.

To the extent that the Court's instruction really had stricken him as prejudicially polite, it certainly seems that Mr. Brown's counsel would have sought to correct the error before his client was convicted. Yet, not once among his several submissions during the Court's numerous off the record charge conferences did counsel ever suggest a final curative instruction. Had counsel truly believed that the Court's instruction regarding the 302 was insufficient, misleading, or prejudicial, the Court certainly would have welcomed a proposed curative instruction. In fact, the Court expressly told Mr. Brown's counsel that it wanted to be sure that he was happy with the Court's instruction regarding the note so that it would not "create an issue" for appeal, *see* 9/27/00 Tr. Burton Cross pp. 18-19 lines 23-25 and 1 (the Court, to Mr. Jeffress: "Is that what you want me to tell them? Because I don't want that to be an issue on appeal. I know the issue is on appeal as to whether you get the notes, but I don't want to create an issue."), and immediately offered a curative instruction when the Court's original instruction made him unhappy.

Indeed, since Brown's counsel had already proposed a final instruction that the jury was not required to resolve the underlying merits of the claims against Disiere and Bonneville, ostensibly to lessen juror confusion, and because he demonstrated the ability and motivation to object to numerous instructions during the charge conferences, it would seem natural, if he really cared, that he would have requested a simple, analogous instruction that the accuracy of the notes, the 302, or Agent Burton's testimony *was* at issue. The Court suspects that such an instruction, though not necessary, would have complemented its final instructions regarding the jury's duty to determine facts and evaluate the witnesses' credibility (including prior inconsistent state-

ments).[24] It certainly would have eliminated any possibility that the Court had "*le[ft] to the jurors themselves*, the decision about the 'extent' to which they would ignore" the Court's earlier instruction. Reply Mem. p. 14 (emphasis in original). Of course, it also would have been cumulative to the Court's earlier instruction, and the Court suspects that might have been why counsel let this issue go while fighting over others.[25]

By his silence, the Court concludes that counsel either (1) was actually quite satisfied with the Court's curative instruction (until after his client was convicted) or (2) failed to offer a final curative instruction because he had already "done everything necessary to preserve review." Reply Mem.

---

[24] The Court included the following instructions in its final jury charge:

> As I told you earlier, it is your duty to determine the facts . . . . Also, do not assume from anything I may have done or said during the trial that I have any opinion concerning any of the issues in this case. Except for the instructions to you on the law, you should disregard anything I may have said during the trial in arriving at your own findings as to the facts.
>
> Earlier statements of a witness were not admitted in evidence to prove that the contents of those statements are true. You may consider the earlier statements only to determine whether you think they are consistent or inconsistent with the trial testimony of the witness and therefore whether they affect the credibility of that witness.
>
> If you believe that a witness has been discredited in this manner, it is your exclusive right to give the testimony of that witness whatever weight you think it deserves.

[25] *See, e.g.*, Rec. Doc. No. 429 (Minute Entry noting several of Brown's objections to jury instructions, including an objection to his own proposed instruction and a modification based on that objection); Rec. Doc. No 430 ("Jim Brown's Objections to Proposed Jury Charge"); Rec. Doc. No. 415 (same).

p. 15. While the latter strategy plainly creates more issues for appeal, it certainly seems a better strategy for one's client to try to avoid the necessity of an appeal in the first place.

D. "*Cumulative*."

Defense counsel now also objects, for the first time, to the Court's ruling that the 302 was "cumulative." It must be stressed that, at no point prior to the filing of the present motion, did counsel ever object to the Court's use of the word "cumulative," even though he was fully apprised that "cumulativeness" was the grounds on which the Court sustained his motion to exclude the 302 from evidence. Instead, counsel appeared more than satisfied by the fact that his objection had been sustained and the 302 would not go to the jury.

As described earlier in this order, during Brown's cross-examination of Burton, a prosecutor objected to what he described as Mr. Brown's counsel's practice of going "line by line over the 302" and offered to admit it into evidence. 9/27/00 Tr. Burton Cross p. 30 lines 14-16. Asked for his response to the Government's offer to admit the 302 into evidence, Mr. Brown's counsel stated that "I would object to it to admit it for the truth of the matter asserted. It's being used for refreshed recollection and impeachment." *Id.* p. 31 lines 5-7. The Court sustained the objection on the grounds that the 302 "[i]s cumulative." *Id.* lines 10.11.

Although it is true that Mr. Brown's counsel had offered a hearsay objection, he complained about the Court's use of the word "cumulative" neither at this point nor during the sidebar moments later, when the Court reiterated its view that the 302 should not go into evidence because "it's like any other report

and it's cumulative." *Id.* p. 35 lines 5-6.[26] Neither defense counsel's proffer of an alternative ground for excluding the 302 nor his readily apparent satisfaction that his objection had been sustained and the 302 would be excluded gave the Court reason to believe that he was objecting to the Court's use of the word "cumulative." *See* Polasek 162 *F.3d* at 883 (trial court judge must be "fully apprised of . . . an objection."). Thus, the Court could not forebode that its rather innocuous instruction that "once the expert, the doctor or anyone who

---

[26] The Court's mention of the word "cumulative" occurred during the following section of the sidebar regarding the Government's motion to admit the 302 into evidence:

> MR. MANN: . . . I offered the [302] into evidence because Mr. Jeffress is reading it line by line to Mr. Burton and I think it's unfair.
>
> THE COURT: Usually it's like any other report and it's cumulative.
>
> MR. JEFFRESS: Usually you ask the witness "Did someone say this to you," and if he says he didn't say it I can impeach him with the 302. That's what rm doing.
>
> THE COURT: Exactly.
>
> MR. MANN: I offered it into evidence because he is going line by line and I don't want Mr. Jeffress to take anything out of context on the 302 because I think that's unfair. The 302 speaks for itself.
>
> THE COURT: In a matter of expediting the testimony, so you still object to the submission to the jury of the 302?
>
> Mr. JEFRESS: Yes, I do.

9/27/00 Tr. Burton Cross p. 35 lines 2.17. Thus, Mr. Jeffress did not expressly object to the Court's use of the word "cumulative," and the Court interpreted Mr. Jeffress' statement as providing an example of a practice consistent with its understanding of the word "cumulative:" "the lawyers . . . use [a written report] to know what the testimony is going to be, but once the doctor or anyone who prepared the report testifies," (id. p. 37 lines 1-3), "the typed copy [does not] come into evidence. . . ." Id. p. 36 lines 22.23. In any event, his statement is not so inconsistent as to apprise the Court that defense counsel was objecting to the word "cumulative."

prepared the report testifies, you don't have the written report and the testimony in the courtroom because it's cumulative" (9/27'00 Tr. Burton Cross p. 37 lines 2-5) and admonishment that the jury should pay attention to "the testimony of the witness on direct and through cross" (which clearly includes impeachment testimony) (id. lines 7-8) instead of concerning itself with why it could not have the actual document, would later provide the foundation for a claim that it had prejudiced Brown's defense.

Indeed, as indicated by his failure to object at any point during trial, including during a sidebar conference specifically addressing the admissibility of the 302 during which the Court used the word "cumulative" to describe the 302, it apparently did not occur to defense counsel either until he sat down with the transcript. Perhaps most tellingly, defense counsel still does not contend that the Court's decision to exclude the 302 as cumulative was legally incorrect. Instead, he now asserts the novel theory that a proper and common ground for excluding evidence is prejudicial.

The Court would like to raise one other point concerning defense counsel's tremendously belated *objection to its* use of the word "cumulative." Mr. Brown's brief writer suggests that the Court committed yet another error by failing to "notify[]" him that the jury had asked whether it would get a copy of the 302 for deliberations and thereby deprived him of an "opportunity to comment." New Trial Mem. p.19. Apparently the brief writer forgot about this excerpt from the bench conference concerning the admissibility of the 302:

> THE COURT: This may temper your decision making. The jury wants to know if they get a copy of the 302s for deliberation.
>
> 9/27/00 Tr. Burton Cross p. 34 lines 22-24.

The simple fact of the matter is Brown's counsel, with full notice, failed to object to the Court's use of the word

"cumulative" until after his client was convicted. There was no error and there was no prejudice.

E. "*Chastised.*"

Mr. Brown's counsel now also objects for the first time that another common ground for sustaining an objection, that a question is misleading, is prejudicial because it makes it sound as if the attorney has been "chastised." New Trial Mem. p. 26.

Mr. Brown's counsel asked Agent Burton whether "your notes that you actually wrote down when you were in that interview say that Jim Brown said that he didn't discuss with Edwin Edwards what it would take—." 9/27/00 Tr. Burton Cross p. 62 lines 1547. This question may sound innocuous when viewed alone, but, in light of Agent Burton's well-documented propensity to shuffle through the indictment and his 302 before answering questions, the Court felt that this question tended to suggest, incorrectly, that Agent Burton had his notes in front of him, and, if he could not answer, would have given the impression that Agent Burton had *not* written that particular statement down in his notes. In other words, the question would be misleading to the jury, objection sustained. By way of comparison, the Court did not prevent Mr. Brown's counsel from asking Agent Burton several times whether he was sure that he had formulated [illegible] question in a particular manner or that Mr. Brown had ph[illegible]d a response in a particular way (*e.g.*, whether Agent B[illegible] was sure that Jim Brown had said "an amount of settlement" or whether he might have said "the amount of settlement"), nor did it prevent him from driving home the point that Agent Burton had misspelled "Ernie" in his notes. Neither of those situations created the impression that Agent Burton had the notes in front of hum, and the Court interrupted neither line of questioning. The Court cannot be held responsible for Mr.

Brown's counsel's choice to "refrain[] from further [proper cross-examination" because he felt "chastised" by a standard ruling. New Trial Mem. p. 26.

Moreover, the Court merely sustained an objection that defense counsel's question was misleading; it did not take the opportunity to actively disparage counsel and praise the Government and Agent Burton. In a case cited by Brown himself in his post-trial motion, the Fifth Circuit found far more aggressive language from the trial judge's own mouth, protecting the "government's star witness" from a baseless attack by the defense, less than ideal but not quite prejudicial error. In *United States v. Williams*, 809 F.2d 1072 (5th Cir.1987), the trial judge commented that defense counsel's cross-examination of "the government's star witness" involved "an unwarranted attack of the Government," which "the jury is not to consider. . . ." The judge then added, "Sometimes the tactics of lawyers is to throw a smoke screen from the facts and inject in the case questions for which there's absolutely no basis." *See id.* at 1086 and 1088 n.15. The Fifth Circuit did not find this to be reversible error, even after acknowledging that "a trial judge has enormous influence on the jury," as defense counsel points out. New Trial Mem. p. 21 (citing *Williams* at 1086). At the risk of stating the obvious, the Court's sustaining an ordinary "misleading" objection does not even begin to approach the level of "chastisement" exemplified in *Williams*.

Mr. Brown also argues in this section of the brief that the Court's allegedly impermissible limitation on his cross-examination of Agent Burton was especially harmful "[b]ecause Agent Burton provided the government's *only* evidence regarding what Mr. Brown said during the interview . . . ." New Trial Mem. p. 28 (emphasis in original). At the risk of stating the obvious, this contention is simply not true. As noted several tunes above, *Mr. Brown* also testified "regarding what Mr. Brown said during the interview," which

provided the government with *additional* evidence on this topic. And Mr. Brown vouched for the accuracy of most of the 302, give or take an "a" or a "the" here and there. *See, e.g.*, 10/3/00 Tr. Brown Cross p. 212 lines 17-18 (Brown testified, "In fact, I think a majority of the things [Agent Burton wrote down] are probably correct."). Of course, Agent Burton was the onlywitness *called* bythe Government, but that does not deprive Mr. Brown's testimony of its evidentiary qualities. Thus, even if the Court erred in limiting cross-examination with respect to the rough notes, this error would in no way have affected those aspects of Agent Burton's testimony with which Mr. Brown expressly agreed, such as the testimony regarding the statements underlying the conviction on Count 51.[27]

F. *Extrinsic Influence Inquiry.*

For the first time, Brown's counsel objects to the Court's alleged failure to conduct an evidentiary hearing" regarding the accidental introduction of the 302 into the jury room. New Trial Mem. p. 34. This argument is wholly unsupported by the record.

Within an hour of receiving notice from the marshal that the j ury had the 302, the parties had sorted through the evidence in the exhibit binder to ensure its propriety, the Court and the parties had interviewed the government paralegal responsible for the error, and the Court had interviewed the juror who had discovered the clandestine document on the record with counsel present. Mr. Brown's counsel failed to request any further investigation or other measures, even after the Court expressly asked all parties

---

[27] Thus, the Court agrees with Mr. Brown that "the government's entire case on the false statement counts depended on the credibility of one person." Reply Mem. p. 23. The jury made their credibility choice.

whether they wanted "[anything else" done.[28] Surely this was a message that the Court was satisfied that there had been no prejudice. Surely the appropriate time to request additional inquiry was prior to the resumption of deliberations, or at least prior to the rendering of the verdict, when all jurors were readily accessible and uncorruptedby outside influence, not several weeks following an adverse verdict. Indeed, counsel clearly showed the ability to request a timely, recorded interview of the juror who discovered the *302*. *See* New Trial Mem. p. 32 ("At counsel's request, the juror who called the matter to the Court's attention . . . was questioned on the record. . . ."). Counsel's failure to request to interview the juror personally, to interview any other juror, for any specific limiting instruction, or for any other safeguard he now deems essential, is thus quite noteworthy. Apparently upon reflection, counsel feels that his "opportunity to observe the juror" was inadequate, though he was clearly free not only to "observe" but also to participate in her examination. New Trial Mem. p. 34. Similarly, at trial, counsel appeared satisfied following the nonpublic, off-the-record conference with the Court and counsel" that the Government paralegal had "not intentionally include[d] the two 302s . . . among the materials given to the jury." *Id.* p. 35. Several weeks after his client's conviction, however, he now protests that this "investigation" was "informal," "incomplete," and, therefore, "insufficient." *Id.*

---

[28] After completing the interview of the juror, the following exchange occurred:

> THE COURT [to all counsel]: All right. Anything else? Sorry for the incompetence.
>
> MR. CASTAING: Everybody makes mistakes.

10/6/00 Tr. Brown's counsel was conspicuously silent. Until his present motion, that is.

Regardless, the Court was absolutely satisfied from its interview of the juror that the brief introduction of the 302 into the jury room did not prejudice the jury's deliberations and, therefore, did not believe that further inquiry was necessary. As defense counsel notes, the 302 was available to the jury for only about an hour, (New Trial Mem. p. 34),[29] an how during which the jury was busy selecting its foreman and waiting for (but not reviewing) exhibits. In fact, the presence of the 302 was not detected until the jury began to *organize* the exhibits, *prior to reviewing* them. The juror's comments indicated that the binder of exhibits which contained the 302 had been closed before she opened it, leading to the conclusion that no other juror had seen it. It was clear from her actions and statements that she was the last juror to see it, since she immediately gave it to the marshal without reading it.

---

[29] Apparently, in the time between Mr. Brown's original New Trial Memorandum and his Reply Memorandum, the jury reconvened and read the 302 some more. *Compare* New Trial Mem. p. 34 ("the jury had the 302 available only for *an hour* or so") with Reply Mem. p.17 ("It is *undisputed* that the 302 . . . was in the jury's possession for *over two hours*.") (emphasis added to both)

The jury was dismissed for deliberations. Counsel placed objections on the record. The parties prepared the exhibits for the jury. The exhibits were then delivered to the jury. Thus, the jury did not have the exhibits until some time after they had been dismissed for deliberations. The jury had been dismissed for about an hour when the marshal alerted the Court that the 302 had been in an exhibit binder. The juror who had discovered the 302 had given it to the marshal immediately. The jury then went to lunch for an hour or so. The pasties reviewed the exhibit binders, waited for the courtroom deputy who had delivered the binder to the jury to get back from lunch, and interviewed the government paralegal. After the jury returned from lunch, the parties interviewed the juror who had found the 302. Thus, the 302 was in the jury's presence for an hour at most, and, from the time of dismissal, the entire incident, including the extrinsic influence inquiry and the jars lunch break, took only about two and a half hours.

The juror's statements and actions demonstrated that she was abundantly aware that she was not to consider the 302 as evidence, *or even read it*, obviating the need for a specific instruction "to disregard the 302." New Trial Mem. p. 32. Defense counsel's characterization of the juror's testimony is *grossly* misleading on this point. The juror testified that she opened up the binder, "picked [the 302] up," "didn't see an exhibit number on it," then "*glanced in the top corner*, saw '302,' and I know the number 302 now and so I *walked out to the marshal* and said, `I think this a 302, but I'm not sure, and they said, 'Let me hold on to it until we find out." Tr. Extrinsic Influence Inquiry p. 2. How counsel inferred from this testimony that the juror had been "*reading* the 302 [before] she realized what it was" is a mystery. New Trial Mem. p. 32 (emphasis added). The juror's next statement eliminates room for interpretation: "I saw 'Federal Bureau of Investigation' written at the top. *That's all I had read and that was it.*" Tr. Extrinsic Influence inquiry p. 2.

The juror's credibility, as well as her demonstrated conscientiousness in turning the 302 over *to the marshal without* reading it, impressed the Court immensely. The Court was also quite aware that the juror already had taken two oaths, as a member of the venire and as a juror, to execute her duties faithfully. Thus, the Court was and is quite satisfied that it conducted an adequate extrinsic influence inquiry and that the presumption of prejudice was conclusively rebutted. The prejudice involved in the cases cited by defense counsel was so egregious as to be readily distinguishable from the circumstances presented to this Court.

The Court would, however, like to make two further clarifications regarding this issue. In his motion, Brown's counsel suggests that, "[u]nbeknownst" to him, the Government paralegal insidiously and intentionally "plac[ed]" the 302 in the evidence presented to the jury. New Trial Mem. p. 31; Reply Mem. p.19. First, the Court would like the record

to reflect that it immediately determined, off the record but *with counsel present and to his apparent satisfaction*, that the inclusion of the 302 was the result of *simple error*. Incompetence, yes; perniciousness, no. Second, although it is, of course, ultimately the Court's responsibility, through the courtroom deputy, to make certain that only evidence that was properly admitted is presented to the jury, as a matter of adequate representation, an attorney (and not merely a paralegal) must ensure that all of his exhibits—and none of the exhibits that he successfully prevented from being admitted—go to the jury.

G. *Prejudice When Considered Cumulatively.*

Mr. Brown argues that, when considered as a totality, the Court's use of the word "cumulative" twice [30] and the word "accurate" once,[31] the Court's sustaining of an objection of "misleading," his counsel's inability to force Agent Burton to admit that "I have to rely on this 302" a ninth or tenth time, the fact that he was deprived of a set of handwritten notes that do not appear to say "a" when Brown says he meant "the" (and vice-versa), and the cameo appearance of the 302 in the jury room all contributed to deny hire a fair trial.

Ignoring his own testimony, Brown argues that these alleged errors bestowed an aura of infallibility upon "the *only* witness on the false statement counts against Mr. Brown" (New Trial Mem. p. 22 (emphasis in original)) by "shor[ing] up the credibility" of the witness (*id.*), somehow "inform[ing] the jury that Agent Burton's notes of his interview were identical to his trial testimony" (*id.* p. 21), and telling the jury that defense counsel "was engaged in a speculative and

---

[30] The Court actually used the word "cumulative" a third time, but that was during a sidebar.

[31] The Court actually used the word "accurate" twice, but the second time was to admonish the jury not to consider its first use.

baseless line of attack on the credibility of an apparently blameless witness" (*id.*), thereby "eliminating the possibility . . . that there was significant room for error in his testimony" (*id.* pp. 20-21). As proof of prejudice, Brown notes that the jury convicted him on Count 44, even though "Burton conceded that the word 'only' that appears in Count 44 of the indictment is not in the 302, and that the 302 reflects numerous specific things that Mr. Brown told him about Cascade Insurance Company . . . , thus contradicting Burton's testimony that Brown claimed he was only 'vaguely' familiar with Cascade." New Trial Mem, p. 20 n.17.

Of course, if Mr. Brown's argument were true, there would have been no acquittals.

And, were his logic correct, because the jury acquitted Mr. Brown on Count 52, he would have to concede that the jury clearly heard Agent Burton admit on cross-examination by Brown's attorney that Brown had actually told Burton that he was "sure I did" talk to Bourgeois (9/27100 Tr. Burton Cross p. 68 lines 13-16) and that he had actually asked Brown whether "you discuss[ed] the Civil RICO suit with Bob Bourgeois" (*id.* pp. 71-72 lines 23-25,1), "thus contradicting" (New Trial Mem. p. 20 n.17) Count 52, which charged Brown with falsely stating that "he had no conversation with Bourgeois concerning Cascade Insurance Company and David Disiere . . . .

Thus, it appears that only two possible conclusions can be drawn from the fact that the jury convicted Brown on some counts and acquitted him on others; either the jury was selectively prejudiced by the Court's allegedly improper instructions and various other alleged errors or it paid close and proper attention to the evidence and adhered to the Court's strong admonitions "not to . . . weigh[] . . . any comment I make on the evidence . . . in your credibility findings." 9/27/00 Tr. Burton Cross p. 36 lines 6-8. *See also, e.g.*, Final Jury Charge; Opening Jury Charge ("No statement

or ruling or remark which I may make during the presentation of evidence is intended to indicate my opinion as to what the facts are. You are to determine the facts. In this determination, you alone must decide upon the believability of the evidence and its weight and value."). In light of the series of wounds Brown inflicted on Burton and on himself, the Court finds the latter possibility to be the only plausible conclusion. Indeed, in light of his convictions, it appears that the jury found most striking Brown's insistence, *in court, for the fury's evaluation*, that his discussion of "a compromise" had "nothing to do with the settlement" and that Cascade was "[n]ot at all" on his mind when he filled almost 14 pages of a single-spaced, 23-page transcript with his discussion of Cascade in Edwin Edwards' office.

And, in light of Mr. Brown's acquittals, it certainly seems that the jury did not find, as one might expect from reading the defense memoranda, that Agent Burton was a slick operator who offered a plausible, incriminating explanation for everything.[32] For example, in acquitting him on Count 53,

---

[32] "[T]he cross-examination of [Agent Burton] adequately enabled [Mr. Jeffress] to argue why the jury should disbelieve him." *Williams*, 809 F.2d at 1 086 (trial court did not abuse its discretion in limiting defendants' cross examination of "the government's star witness" regarding prior perjury). *See* Tr. Brown's Closing Argument (because finding Brown's statements depended on the "twisting of words of fine distinctions about whether it's 'a settlement' or 'the settlement' . . . and things like that, ladies and gentlemen, you would expect . . . more proof than an agent who can't remember what really was said and has to read to you from the indictment when he's asked what was said.")

Indeed, even just reading the transcript, one would be hard pressed to believe that the jury could have concluded that there was no "significant room for error in [Burton's] testimony," no matter what the Court said. New Trial Mem. p. 21. For example, as Mr. Jeffress's acerbic crossexamination drilled home, it was absolutely incontrovertible that Burton assigned Ernie Branch a name of the opposite gender ("Eunice—E-U-N-I-C-E"). And the Court, even had it wanted to, could have done nothing to repair the damage to Agent Burton's credibility after Mr.

the jury appears to have *believed Brown's explanation*, that his statement, "ii tell Bourgeois he's gotta do it" (Govt. Ex. G-540 p. 4), meant that he would tell Bourgeois to honor his promise "to get back [to the Disiere people] with a list of some issues for them to discuss" (10/2/00 Tr. Brown Direct p. 69 lines 23-24) and to actually "sit down and meet with Mr. Weems and whoever else Mr. Weems might want to bring in (id. p. 70 lines 2-3), and *disbelieved Agent Burton's interpretation* that this statement indicated that Brown would "direct Bourgeois to settle the Cascade Insurance matter." Count 53. In light of the proximity in time of this statement to the actual settlement (December 2, 1996 and December 19, 1996 respectively), and the fact that "do it" arguably could have been a direction to settle the Cascade matter, the Court concludes that the jury properly weighed the evidence and the credibility of each witness and determined that Brown, in this instance, had not lied.

Similarly, the jury appears to have *believed Mr. Brown* when he *denied* telling Agent Burton "the only thing [he] knew about that contingency fee contract was something [he] had learned from an Assistant Attorney General [Cassandra Simms]" (10/3/00 Tr. Brown Direct pp. 53 lines 14-16), *even though* the allegedly untouchable Agent Burton testified he had (9/27/00 Tr. Burton Direct p. 11 lines 6-8) and *even though* Burton's allegedly unassailable 302 stated that "CASSANDRA SIMMS of the LOUISIANA ATTORNEY GENERAL'S OFFICE told [him] of GONZALFZ being hired as a Special Master and then the next day being appointed as a litigant on a contingency basis, to file a suit against DISIERE." 302 p. 10. *But see* New Trial Mem. pp.

Jeffress forced hire to admit to the jury, eight or nine times, that he had to "rely on" the 302 because he couldn't "rely totally on my memory, no, sir." The Court does not mean to mock Agent Burton. It just wishes to emphasize that he came off as an ordinary, fallible person on the stand, not as a person who had an explanation for everything.

20-21 (complaining that the Court "eliminat[ed] the possibility' that the jurycould have found that Burton made an error in his notes, his 302, or his testimony).

Thus, even assuming that each objection Brown's counsel now presents was preserved, accurate, meaningful, and valid, and even considering the objections cumulatively, the Court finds that Mr. Brown was not prejudiced in any way by the Court's alleged errors. Accordingly, Mr. Brown's Motion for a New Trial is DENIED.

IV. *Motion for New Trial Based on Prosecutorial Error.*

Lastly, Mr. Brown argues that he was denied a fair trial because the Government allegedly failed to produce (1) a complaint against Agent Burton by another FBI Agent, and (2) information that Ed Gonzalez did, contrary to Agent Burton's testimony, use Burton as a "source" and otherwise communicate with Burton in the course of his work as a Special Master for Judge Sanders. The Court has reviewed these allegations and finds no *Brady* violations.

As Mr. Brown correctly notes, Agent Burton testified on direct examination that he had never been cited for improper conduct or disciplined in any way. After Burton testified but before the trial ended, Brown's counsel interviewed FBI Agent Karen Gardner, who allegedly told them that she had fled "some type of complaint involving Agent Burton, which she believed had been produced as Gielio material in the riverboat gaming trial of Edwin Edwards." New Trial Mem. p. 36. "Counsel thereafter attempted to find such material, but was told by a representative of the defense in *U.S. v. Edwards*," who happened to be counsel's own paralegal, and who sat at the defense table throughout the *Brown* trial, "that it was not contained in the *Jencks* or *Gialio* material produced in that [riverboat] case." *Id.* n. 36. Defense counsel certainly never brought this matter to the Court's attention at trial and has not produced any evidence, other than his own hearsay,

for the Court to conclude that this allegation has any merit. Indeed, counsel neither questioned Agent Gardner regarding this incident while she testified as his witness nor requested that the Court meet with her out of the presence of the jury to investigate his current allegation. At the Court's request, the Government once again contacted individuals within the FBI who would have access to this information and once again came up empty. The Government has admitted that there was bad blood between Agents Gardner and Burton, but nothing that rose to the level of an actual complaint. The Court simply does not find that defense counsel's unsupported hearsay allegation regarding an issue he knew about but failed to raise when convenient (*i.e.*, while the maker of the hearsay statement was before the Court and before his client was convicted) warrants any further proceedings. Again counsel shows a disturbing tendency to fail to raise issues and objections at trial and then claim that the Court failed to execute its obligations in order to cast doubt on his client's conviction.

Similarly, Mr. Brown argues that the "time records of [Ed] Gonzalez produced in discovery . . . strongly suggest the existence of information supplied by Gonzales to the Government, and not produced to the defense, contradicting Burton's denials of dealings with Gonzalez concerning his work for Judge Sanders." New Trial Mem. p. 39. Although perhaps more reliable than his report of Agent Gardner's statement, these documents, which counsel brings to the Court's attention for the first time, obviously contain hearsay. As we well know, just because someone wrote something down does not make it true. And, it is hard to detect how these notes actually contradict Burton's testimony. As counsel quotes, Burton testified that he had "never had a conversation with Ed Gonzales from the time he left the United States Attorney's Office *until* I interviewed him *April 25* [,1997]." New Trial Mem. p. 38 (emphasis in original omitted in part). How is this contradicted by defense

counsel's statement that "[t]he time records of Mr. Gonzales produced in discovery . . reveal that he spent no fewer than 30 hours *during September-November* 1997 alone meeting with prosecutors and agents"? New Trial Mem. p. 39 (emphasis added). And, of course, the Court assumes that the defense had many of these records in its possession prior to the instant motion, but chose not to raise this issue until now. Even if the Federal Rules of Evidence "obliged [Mr. Brown] to accept [Burton's] answers as true" in front of the jury (Reply Mem. p. 22), the Court was not likewise constrained and could have used these documents to investigate the Gonzalez situation before deliberations began. The Court simply does not find that Mr. Brown has raised any issue regarding Agent Burton's dealings with Ed Gonzales. Accordingly, Mr. Brown's Motion for a New Trial is DENIED.

V. *Defense Error.*

Mr. Brown's counsel reacts surprisingly defensively to the Government's suggestion that he might have inserted errors into the record himself on which to capitalize if the need should arise. The Court would expect an attorney to remain silent, or at least calm, in the face of such "surprising" and "fanciful" "assertions" were they unfounded. Reply Mem. p.11.

But the number of times counsel failed to bring "errors" to the Court's attention until after his client was convicted makes the Government's assertion appear anything but "fanciful." Take for example, counsel's argument that his "hearsay" objection served not only (1) to object to the admission of the 302 into evidence, and not only (2) to object to Agent Burton's use of the 302 to refresh his recollection, but also (3) to lodge a future objection to the Court's use of the word "cumulative", which the Court had not yet used. Indeed, by making a hearsay objection, counsel argues that "Mr. Brown has did [sic] everything necessary to preserve review." Reply Mem. p.15. Look also to his failure to request

a *final*, curative instruction with respect to the accuracy of the notes, especially in light of his earlier request for an instruction he now deems unfit. Indeed, the Government's charge that counsel intentionally manufactured prejudice with respect to the notes elicited counsel's touchy defense of his tactics. *See, e.g.*, Reply Mem. p. 11 (emphasis added) (Counsel argues that "Mr. Brown made *every* lawful effort to . . . ameliorate the Court's instruction that the 302 accuratelyreflected the notes. . . ." This statement, ifnot gross exaggeration, is patently untrue.) Similarly, by requesting only a portion of the extrinsic influence investigation to be placed on the record, Mr. Brown now may argue that the numerous measures taken were impermissibly "informal and incomplete." New Trial Mem. p. 35. In fact, in most of the situations about which he now complains, the Court suspects that counsel either (1) failed to object because he saw no error at the time, (2) was afraid to object because he contributed to the error, or (3) attempted to technically comply with the objection requirement without the Court noticing so the objection would be "preserve[d] [for] review" without being addressed at trial. Reply Mem. p. 15.

Thus, the Court agrees with defense counsel that he did not seek to "improperly capitalize" on any phantom errors "to seek tactical advantage in the *jury's* eyes." Reply Mem. 11 (emphasis added).

V. *Conclusion.*

The jury, fully informed of his defenses andd having had a full opportunity to evaluate his credibility as he personally explained his tape-recorded statements, determined that Defendant James Harvey Brown lied to FBI Agent Ham Burton seven times on May 2, 1997. Because there was ample evidence to support most of those findings, and because the Court made no errors that impaired the jury's ability to evaluate the evidence or Mr. Brown's credibility,

IT IS ORDERED that Defendant Brown's Motion for Judgment of Acquittal with respect to Counts 44 and 46 is GRANTED, but Defendant's Motions are DENIED in all other respects.

New Orleans, Louisiana, this 26th day of January, 2001.

/s/ Edith Brown Clement
EDITH BROWN CLEMENT
UNITED STATES DISTRICT COURT

APPENDIX D

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA
(Section "N" E.D. La.)

[Filed Sep. 22, 2000]

CRIMINAL ACTION
No. 99-151-B-M2

UNITED STATES OF AMERICA,

versus

JAMES HARVEY BROWN, *et al*,

On September 15, 2000, the Court held a telephone conference with counsel for defendant James Brown and the Government regarding Mr. Brown's renewed request that the Government produce the handwritten notes taken by FBI Agent J. Harry Burton during his May 2, 1997 interview of Mr. Brown.[1] The Court reviewed Agent Burton's notes *in camera* and concluded that the 302 given to Mr. Brown accurately reflects the information contained in the handwritten notes. Accordingly, the Court advised counsel that it would not order the Government to turn over the notes.

Mr. Brown subsequently filed a "Memorandum Regarding the Production of Interview Notes." Rec. Doc. No. 393. The Court has considered and now rejects the arguments raised in Mr. Brown's memorandum. The Court agrees with Judge Sear's conclusion in *United States v. Boyd*, upon which Judge

---

[1] Mr. Brown originally moved to compel production of Agent Burton's interview notes on December 2, 1999. *See* Rec. Doc. No. 61. Judge Polozola denied the motion on March 22, 2000. *See* Rec. Doc. No. 114.

Polozola relied, that Rule 16(a)(1)(A) does not require production of Agent Burton's notes. *See also United States v. Coe*, 220 F.3d 573, 583 (7th Cir. 2000), and *United States v. Muhammad*, 120 F.3d. 688, 699 (7th Cir. 1997). Moreover, because the 302 accurately reflects the information contained in the handwritten notes, the Court finds that their disclosure will not enable Mr. Brown to significantly alter the quantum of proof in his favor. *See United States v. Reeves*, 892 F.2d 1223, 1226 (5th Cir. 1990)(quoting United States v. Ross, 511 F.2d 757, 763 (5th Cir 1975).

The Government need not produce Agent Burton's handwritten notes.

APPENDIX E

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA
(Section "N" E.D.La.)

[Filed Aug. 10, 2000]

CIVIL ACTION

No. 99-151

UNITED STATES OF AMERICA

versus

JAMES HARVEY BROWN, *et al*

ORDER AND REASONS

In a minute entry dated July 13, 2000, the Court granted the Government's Motion for an Anonymous Jury, with written reasons to follow. The Court now issues its reasons for granting the Government's motion.

BACKGROUND

On September 24, 1999, Louisiana Insurance Commissioner James Harvey Brown ("Brown"), former Louisiana Governor Edwin W. Edwards ("Edwards"), attorney Ronald R. Weems ("Weems"), and three other individuals were indicted in the United States District Court for the Middle District of Louisiana on numerous counts of conspiracy, mail and wire fraud, insurance fraud, making false statements, and witness tampering. The charges all stem from the alleged "sham" settlement of a $27 million lawsuit threatened by the State of Louisiana against David J. Disiere ("Disiere"),

president of Cascade Insurance Co. ("Cascade"), a failed automobile insurance carrier.

On July 13, 2000, this court granted the Government's motion to withhold the names, addresses, and places of employment of the members of the jury. The Court now sets forth the reasons for this decision.

LAW AND ANALYSIS

Anonymity has long been an important element of our jury system; all jurors are "randomly summoned from the community at large to decide the single case before them" and "inconspicuously fade back into the community." *United States v. Branch*, 91 F.3d 699, 723 (5th Cir. 1996), *quoting United States v. Scarfo*, 850 F.2d 1015, 1023 (3d Cir. 1988). By granting the instant motion, the Court has merely increased the degree of anonymity by withholding the jurors' names, addresses, and places of employment. However, the defendants will still have access to a wealth of information about the panel through an extensive voir dire and an exhaustive 42-page juror questionnaire.

The Fifth Circuit has set out five, non-exclusive factors that may justify empaneling an anonymous jury: (1) the defendant's involvement in organized crime; (2) the defendant's participation in a group with the capacity to harm jurors; (3) the defendant's past attempts to interfere with the judicial process or witnesses; (4) the potential that, if convicted, the defendant will suffer a lengthy incarceration and substantial monetary penalties; and (5) extensive publicity that could enhance the possibility that jurors' names would become public and expose them to intimidation and harassment. *See United States v. Krout*, 66 F.3d 1420, 1427 (5th Cir. 1995). None of these factors are dispositive, and the Fifth Circuit has stressed that the decision to empanel an anonymous jury should be based on the totality of the circumstances. *See*

Branch, 91 F.3d at 724; *United States v. Salvatore*, 110 F. 3d 1131, 1143 (5th Cir. 1997)

Three of these five factors are present in the case at bar, mandating the use of an anonymous jury. First and most importantly, numerous charges allege that the defendants attempted to "interfere with the judicial process or witnesses." *Krout*, 66 F.3d at 1427. In connection with the accusation that they derailed a $27 million dollar lawsuit threatened by the State of Louisiana against Disiere, the defendants are charged with witness tampering, attempting to bribe a judge, attempting to illegally terminate a federal investigation, and influencing a court appointed special master. *See* Second Sup. Indict. at 13-15, 42. These are very serious allegations that suggest the defendants may be willing and able to interfere with the judicial process.

Although the mere allegation of interfering with the judicial process may not be enough to warrant empaneling an anonymous jury, several individuals involved in the case at bar have already proven their ability to corrupt the legal system. Robert A. Bourgeois and Alfred F. Sanders, III, co-conspirators indicated with the defendants, have plead guilty to witness tampering in connection with the Cascade lawsuit. Another co-conspirator, David Disiere, plead guilty to misprision of a felony. In a separate trial, Edwards was convicted of interfering with the State of Louisiana's judicial and administrative processes for licensing river boat casinos. *See United States v. Riggio*, 70 F.3d 336, 340 n 21 (5th Cir. 1995)(holding that a defendant's past attempts at interfering with judicial proceedings demonstrated his lack of respect for the judicial process and suggested that he was willing and able to interfere with the jury system). The Court finds that these individuals' past activities support the use of an anonymous jury in the case at bar.

Secondly, an anonymous jury is appropriate when the defendant faces "a lengthy incarceration and substantial

monetary penalties." *Krout*, 66 F.3d at 1427. If convicted of the charges in the second superseding indictment, each defendant faces an extremely lengthy sentence and massive fines and forfeitures.

Third the present case has been the subject of extensive publicity which enhances "the possibility that jurors' names would become public and expose them to intimidation and harassment." *Id.* Although pretrial publicity, taken alone, may not be a dispositive factor, it does militate in favor of having an anonymous jury. *See United States v. Wong*, 40 F.3d 1346, 1377 (2dCir. 1994). The Fifth Circuit has already affirmed Judge Frank J. Polozola's gag order, citing the "enormous local and national publicity" surrounding the case. *U.S. v James Harvey Brown*, No. 00-30134, 2000 WL 898058, at *12 (5th Cir. July 6, 2000). The media's numerous motions seeking access to sealed information illustrate the extensive publicity *U.S. v. Brown* has already generated. In the preceding Edwards trial, despite extensive and expensive precautions by the United States Marshals Service to protect the anonymity of the jury, certain members of the media aggressively followed, identified, and contacted jurors in violation of the anonymous jury order issued by Judge Polozola. Likewise, in the instant case, the media's intense interest in gaining access to the jurors' names, addresses, and places of employment strongly counsels the Court to protect the panel from the foreseeable harassment by the media and others. This court has ordered an anonymous jury to protect the judicial integrity of the current proceedings. Any attempts by the media or others to interfere with this order will not be tolerated.

The fact that the indictment does not accuse the defendants of having ties to organized crime does not invalidate the Court's decision to empanel an anonymous jury. The "organized crime" factor weighs heavily in favor of an anonymous

jury, but it is only one element in a fact intensive, totality of the circumstances test. *See Branch*, 91 F.3d at 724.

Furthermore, there is no showing that withholding the names, addresses, and places of employment of the jurors will prejudice the defendants' ability to select an impartial panel. By the time of trial, the defendants will have an "arsenal of information" about each prospective juror. *Id.* at 725. The defendant's will receive detailed 42-page questionnaires completed by each juror, and the Court will elicit additional information at voir dire. *See United States v. Childress*, 58 F.3d 693, 704 (D.C.Cir 1995)(upholding the use of an anonymous jury where the "court conducted a searching voir dire and gave jurors an extensive questionnaire"); *Wong*, 40 F.3d at 1377(upholding anonymous jury where extensive voir dire adequately explored prospective jury bias).

Finally, the Fifth Circuit has held that "the use of anonymous jury [does] not undermine the defendants' presumption of innocence." *Branch*, 91 F.3d at 725. The Court will adequately instruct the jury that the defendants are presumed innocent and that the purpose of empaneling an anonymous jury is to ensure a fair trial for both sides. *See Riggio*, 70 F.3d at 340 & n. 23(5th Cir. 1995)(upholding the use of an anonymous jury where the district court "took effective steps to minimize any prejudicial effects associated with an anonymous jury").

CONCLUSION

The totality of the circumstances strongly supports empaneling an anonymous jury in the present case. The nature of the charges, the co-conspirators' guilty pleas to witness tampering, Edwards' previous convictions, the severe jail sentences and fines faced by the defendants, the extensive publicity surrounding the case, and the potential harassment by the media and others establish a clear need to withhold the names, addresses, and places of employment of the jurors.

Furthermore, the jury's anonymity does not prejudice the defendants' ability to select an impartial panel. The defendants will have more than enough information to make an informed decision about which jurors to select, and the Court will adequately instruct the jury as to why certain information is being withheld. With these precautions in place, the Court finds that the empaneling of an anonymous jury will not compromise the defendants' fundamental rights and will help ensure a fair trial.

Accordingly, the Court finds that granting the Government's Motion for an Anonymous Jury is appropriate.

New Orleans, Louisiana, this 9 day of August, 2000.

/s/ Edith BROWN Clement,
EDITH BROWN CLEMENT
United STATES District Judge

APPENDIX F

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

[Filed Mar. 23, 2000]

CRIMINAL ACTION

No. 99-151

UNITED STATES OF AMERICA

versus

JAMES HARVEY BROWN, *et al.*

RULING

The defendant, James Harvey Brown has filed a Motion to Compel Production of Interview Notes.[1] The government has timely filed its opposition to this motion.[2] The defendant is seeking production of notes taken by an agent of the Federal Bureau of Investigation under Rule 16(a)(1)(A).

For the reasons assigned in Judge Sear's order rendered in United States of America v. Sybil Boyd,[3] the defendant's motion is denied.

---

[1] Rec. Doc. No.61.

[2] *See*, Rec. Doc. No.69.

[3] [No. 91-534] (E.D. La. Jan. 10, 1992) (minute entry affirming magistrate judge's refusal to compel the production of FBI agent's notes).

IT IS SO ORDERED.

Baton Rouge, Louisiana, this 22 day of March, 2000.

/s/Frank J. Polozola, Chief Judge,
FRANK J. POLOZOLA
Middle District of LOUISIANA

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION

No. 91-534

(Section "G")

UNITED STATES OF AMERICA,

versus

SYBIL BOYD.

ORDER

Defendant objects to and appeals the magistrate's discovery order refusing to compel the production of FBI Agent Krieg's handwritten notes of the substance of defendant Sybil Boyd's oral statements to the agent. Agent Krieg interviewed the defendant on two occasions. During these interviews, she took notes in her own hand. Thereafter, using the notes, she prepared formal written reports of the interview (FBI 302s). The defendant has received copies of these reports. She now seeks the handwritten notes.

Defendant contends that the recent amendment to Federal Rule of Criminal Procedure 16, effective December 1, 1991, entitles her to inspect the government agent's handwritten notes. The rule formerly required the government to produce: "the substance of any oral statement which the government intends to offer in evidence . . . . made by the defendant . . . . in response to interrogation by any . . . . government agent . . . ." The rule now requires the government to produce: "that portion of any written record containing the substance of any

relevant oral statement made by the defendant . . . . in response to interrogation by any . . . . government agent . . . ."

The purpose of the amendment is to abdicate the requirement that the government must intend to use the defendant's statement in order for its substance to be discoverable. This is evident by the absence of the words "which the government intends to offer in evidence" in the amended rule. Contrary to the defendant's contention, the amendment does not require the prosecution to produce *all* written records containing the substance of a defendant's statement, where more than one written record conveying the same substance of a defendant's statement exists.

Accordingly,

IT IS ORDERED that the magistrate's denial of defendant's request for the production pf Agent Krieg's notes is AFFIRMED

/s/Morey L. Sear
MOREY L. SEAR
United States District Judge

APPENDIX G

* * *

[1604] Q. You used the word "record," or Mr. Mann asked you "did you record," or you said you "recorded the interview" through these notes. Do you remember that yesterday?

A. Yes, sir.

Q. Where are these notes?

[1605] A. Where are they?

Q. Where are the notes?

MR. JAMES MANN: Objection, Your Honor. I think that issue has already been resolved.

THE COURT: It has and I have determined that it's not something this jury needs to discuss.

MR. JEFFRESS: Well, Your Honor, I don't want to argue in front of the jury, but I think I do need to raise another point with you on that. Your Honor, may I?

THE COURT: That's why we have motions in limine before trial. That's why I review documents that are submitted to me, to determine whether or not it's something the jury is entitled to see or that's necessary.

(WHEREUPON, the following proceedings were held at the bench.)

MR. JEFFRESS: Your Honor, the jury was lead to believe yesterday that Agent Burton "recorded" the interview in his notes. That was the word Mr. Mann used and that was the word Mr. Burton used.

THE COURT: Not by tape-recording, recording like she is recording here this discussion.

MR. JEFFRESS: No, notes. Now, I have never been given those notes, I have never seen those notes, and yet the jury is being led to believe that those notes record the interview

actually. How can I cross-examine that statement if [1606] I have never seen the notes?

THE COURT: You are not entitled to the notes. I reviewed the notes in camera. The notes contain the information that has been presented to you in this 302.

MR. JEFFRESS: With respect, Your Honor, the Court doesn't have the same motivation and the same, you know, detailed work that I have done with respect to comparison—

THE COURT: Normal operating procedure is the F.B.I. records the handwritten notes—if you don't want to say "record," say "transcribe" them, puts them in a 302. The 302 is used with the grand jury or however that information is used.

MR. JAMES MANN: He wants to cross-examine him on the notes and the law is clear he doesn't get them. He gets this to cross-examine the witness with. That's it.

MR. JEFFRESS: Even though you elicited from him the notes and called it "recording," I don't get them. Your Honor. Your Honor has ruled.

THE COURT: That's the procedure for how you create the document. It's naive to think somebody is going to sit there and type it out while they are talking to someone. If you want to ask him what is the procedure, he can explain it again. I think it's already explained, but perhaps I'm wrong.

MR. JEFFRESS: I think the jury ought to understand I don't have the notes and can't show them to him.

[1607] MR. JAMES MANN: I think you ought to tell the jury why the notes weren't given. We are not trying to conceal them. It's because the law is he does not get two sets to mislead that jury, between a statement that is just written and a complete thought that's written in the 302.

THE COURT: Ask the witness if he reviewed the notes and reviewed the 302 and did the 302 contain the information in the notes.

MR. JAMES MANN: I don't think it's proper.

THE COURT: I think they usually throw the notes away.

MR. JEFFRESS: They preserve them. But, Your Honor, I just want to bring out because I think it's unfair that the jury is led to believe—

THE COURT: That's the law, Mr. Jeffress.

MR. JEFFRESS: I understand that. I'm not saying and you can do it or I can do it.

THE COURT: I can tell them you are not entitled to the notes under the law.

MR. JAMES MANN: I wish you would. Judge, I have another issue.

THE COURT: Is that what you want me to tell them? Because I don't want that to be an issue on appeal. I know the issue is on appeal as to whether you get the notes, but I don't [1608] want to create an issue.

MR. JEFFRESS: I want you to tell the jury that "Mr. Jeffress does not have the notes. I have ruled he is not entitled to the notes." I don't want anything about this "You are using them to mislead."

MR. JAMES MANN: The other thing, I think he has opened the door when he asked if he went back to Jim Brown and confirmed the statement. We asked Jim Brown to come to the grand jury and he refused and took the Fifth. I think that's very misleading. It is misleading for him to insist that Brad Myers wouldn't come and see the notes. When we tried to interview Brad Myers, he wouldn't talk to us either. I think the door is opened for me to—

THE COURT: You offered to show the notes to Brad Myers?

MR. JAMES MANN: We offered to discuss what Jim Brown told him and—

THE COURT: Well, you can redirect him.

MR. JEFFRESS: When?

THE COURT: On the Brad Myers—

MR. JAMES MANN: Prior to the indictment and after, both.

MR. JEFFRESS: Brad Myers—

MR. JAMES MANN: He wouldn't talk.

THE COURT: You're sure before the indictment?

[1609] MR. JAMES MANN: Before and after. Not by this agent, by a different agent. We sent out people to ask Brad Myers to speak with us and he would not. That's misleading, to act like Brad Myers was ignored. And also Jim Brown, when he was asked to come and confirm his statement—

THE COURT: Lower your voice.

MR. JAMES MANN: When he was asked to come and confirm his statement to the grand jury, he refused and took the Fifth.

MR. JEFFRESS: That would be a mistrial.

THE COURT: Don't even think—

MR. JAMES MANN: He is trying to say—

THE COURT: You can ask the follow-up about Myers, just very succinctly.

(WHEREUPON, the following proceedings were held in open court.)

THE COURT: Ladies and Gentlemen, before trial we had a pretrial motion in limine as to whether handwritten notes that are recorded contemporaneously with the F.B.I. interview are something that needs to go to the defense lawyers, and the law in this circuit is they do not because what they get is the finished product, the typed product. In some cases the Court is asked to determine whether the typed, finished product is accurate based on the handwritten notes, and that procedure was [1610] followed before this trial. The notes were never made available to defense counsel, so he cannot present them to you or use them to cross examine this witness with. He asked me to explain that procedure to you.

* * *

APPENDIX H

THE DEPUTY CLERK: All rise.

Be seated, please.

THE COURT: Mr. Jeffress.

MR. JEFFRESS: Yes, Your Honor. I wanted to raise an objection on Your Honor's instruction and I didn't want to do it in front of the jury. Your Honor had instructed the jury, in essence, that you had reviewed those notes and determined that they were consistent with or accurately reflected what's in the 302. I didn't know you were going to say that.

THE COURT: That's what I asked you at the bench.

MR. JEFFRESS: The record would reflect what [1622] happened, but my recollection is Your Honor did not tell me that's what you were going to tell the jury, and I hereby move for a mistrial because of that instruction.

The second part of it is that Your Honor, in essence, instructed the jury that the defense lawyers aren't entitled to and don't get those notes.

THE COURT: That's what you told me to tell them, "Tell them I don't have the notes."

MR. JEFFRESS: That you had ruled that I don't have the notes. That's what I wanted them told. Of course, the government has the perfect right to give us the notes. They gave Ron Weems the notes of his interview. They just didn't give them to me. I don't think it's fair to say that the government—

THE COURT: You gave Weems the handwritten—

MR. JEFFRESS: Absolutely.

THE COURT: I thought there wasn't a formal—

MR. JAMES MANN: I'm not aware of that ever happening.

MR. CASTAING: When I got my box of Jencks, there were two 302s, one that had his interview notes and the other that did not. I have them both.

THE COURT: Are the interview notes incorporated in a formal, typed report?

MR. CASTAING: It's typed and attached.

[1623] THE COURT: It's the same thing?

MR. CASTAING: I'm going to ask that to the witness. I assume it's Mr. Burton's handwriting.

THE COURT: It purports to be the same thing?

MR. CASTAING: It has the right date.

THE COURT: What's the objection to giving him the handwritten notes for the co-defendant?

MR. JAMES MANN: Your Honor, I wasn't aware that that was given and, Your Honor, you have already seen—

THE COURT: I didn't know you gave them to one defendant and not the other.

MR. PERRICONE: Your Honor, I think there's an explanation.

THE COURT: I thought it was the policy never to give them since the final product was the work product.

MR. PERRICONE: There was a typographical error, as I understand it, on the original 302 as to the amount of attorneys fees, and out of an abundance of caution I think the note with the correction from 25 to 20 was supplied. That's the only reason why I think that page of the notes was given to the defense.

MR. CASTAING: I have more than one page.

THE COURT: Let me also advise counsel—

MR. CASTAING: I have several pages.

THE COURT: This may temper your decision making. [1624] The jury wants to know if they get a copy of the 302s for deliberation.

MR. PERRICONE: I think Mr. Mann moved it intoevidence.

MR. JAMES MANN: I did. I offered it into evidence because Mr. Jeffress is reading it line-by-line to Mr. Burton and I think it's unfair.

THE COURT: Usually it's like any other report and it's cumulative.

MR. JEFFRESS: Usually you ask the witness, "Did' someone say this to you," and if he says he didn't say it I can impeach him with the 302. That's what I'm doing.

THE COURT: Exactly.

MR. JAMES MANN: I offered it into evidence because he is going line-by-line and I don't want Mr. Jeffress to take anything out of context on the 302 because I think that's unfair. The 302 speaks for itself.

THE COURT: In a matter of expediting the testimony, do you still object to the submission to the jury of the 302?

MR. JEFFRESS: Yes, I do.

THE COURT: Okay. Your motion is denied. If you want me to give what you would consider a curative instruction to them, I will.

MR. JEFFRESS: Well, a curative instruction that you didn't mean to say that you had made any determination that the [1625] notes—

THE COURT: That's exactly what we talked about at the bench, Mr. Jeffress. I will tell them that. I will tell them that.

THE DEPUTY CLERK: All rise for the jury.

(WHEREUPON, the jury entered the courtroom.)

THE COURT: Be seated please. Ladies and Gentlemen, during the recess I was discussing the 302 with counsel. As I told you before trial, any comment I make on the evidence is not evidence and it is not to be weighed in your credibility findings. You are to determine whether a witness is credible, whether evidence is to be given any weight or considered by you because you are the fact finders.

So as to whether the 302 is accurate or whether I have reviewed anything, my determination of anything is totally irrelevant. I did not intend to tell you that it was accurate because that is not within my province. You need to determine the credibility of the witness based on the questioning and the cross-examination and viewing the witness in court and based on the evidence that you receive from a witness in light of all the other evidence in the case, so that is entirely within your province. To the extent that I told you anything contradictory to your job, please ignore that.

You have asked whether you can receive a copy of the 302 for your deliberation, in other words, does the typed [1626] copy come into evidence, and it does not. The reason is, just like when a doctor testifies, if a doctor furnishes a written report or an expert furnishes a written report, that goes to the lawyers in the case and the parties and they can use that to know what the testimony is going to be; but once the expert or the doctor or anyone who prepared the report testifies, you don't have the written report and the testimony in the courtroom because it would be cumulative. In other words, you would hear it twice. So to that extent you are going to hear the testimony of the witness on direct and through cross and, if you will, just give that testimony your attention, please. Thank you very much.

APPENDIX I

BY MR. JEFFRESS:

Q. In Count 50 Mr. Brown is charged with stating that, although he knew Edwards was representing Disiere in some way, he never had any discussions with Edwards concerning, again, the phrase "settlement issues," correct?

A. That's correct.

Q. Or what it would take to settle the matter between the estate of Cascade Insurance Company and David Disiere? Do you see that?

A. That's correct.

Q. Do your notes that you actually wrote down when you were in that interview say that Jim Brown said that he didn't discuss with Edwin Edwards what it would take—

MR. JAMES MANN: I object. We talked about the notes earlier, Your Honor, that that has already been previously [1652] determined, and I think that that is going to be misleading to the jury to put those at issue here. That's exactly what Mr. Jeffress is trying to do by putting those notes at issue.

THE COURT: I think that's correct. Stick to the 302. Do you want me to explain again to the jury the procedure for preparing the form—

MR. JEFFRESS: Let me go to Count 51.

* * *